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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1934

No. 431

PENN GENERAL CASUALTY COMPANY,
PETITIONER,

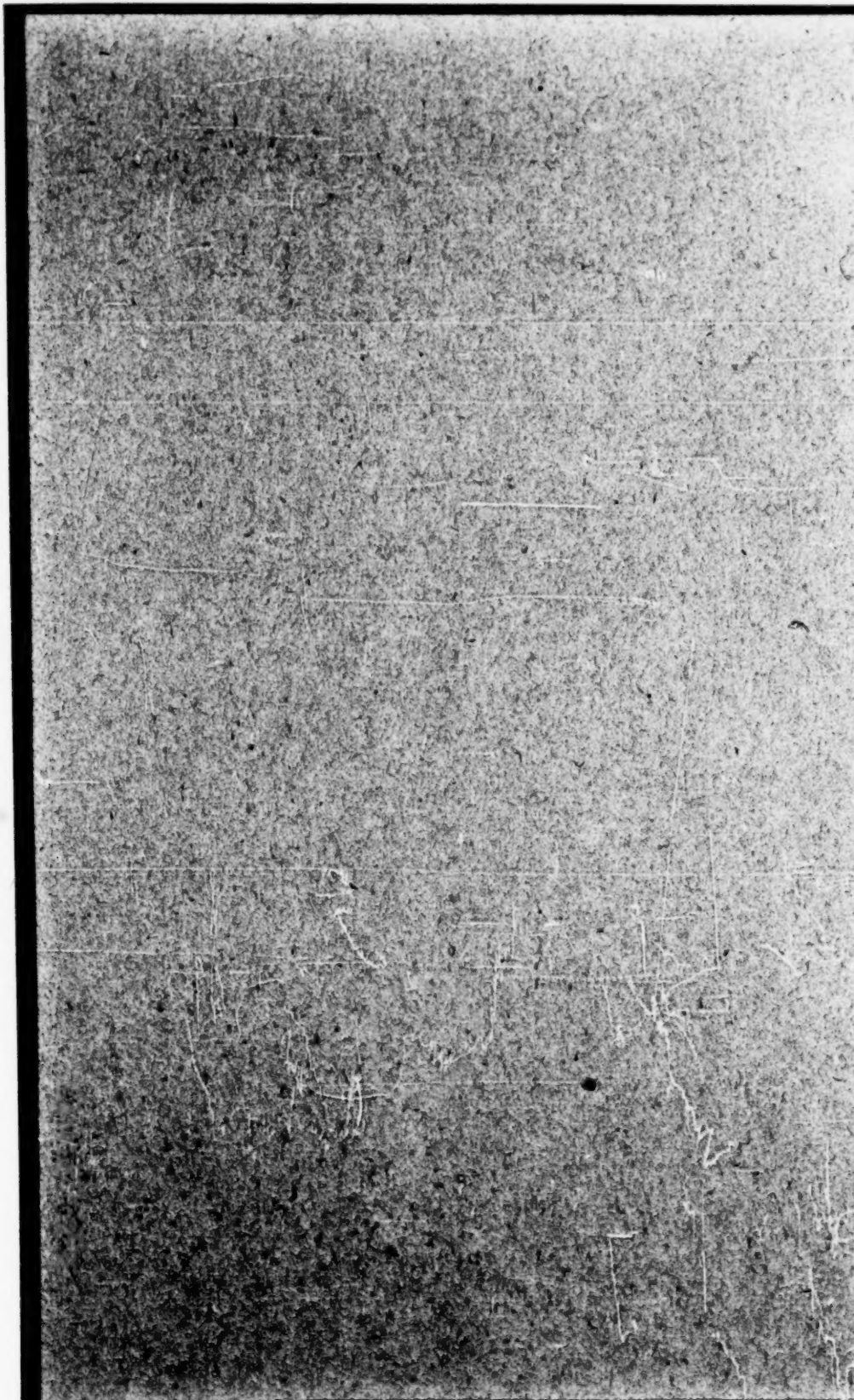
vs.

COMMONWEALTH OF PENNSYLVANIA, EX REL.
WM. A. SCHNADER, ATTORNEY GENERAL

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA

PETITION FOR CERTIORARI FILED SEPTEMBER 29, 1934.

CERTIORARI GRANTED OCTOBER 22, 1934.



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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOV. 22, 1934.

[fol. 1] DOCKET ENTRIES

Among the records and proceedings of the Supreme Court of Pennsylvania, sitting in and for the Middle District, before the Honorable Robert S. Frazer, LL. D., Chief Justice, and his Associate Justices, at Harrisburg, beginning on the 21st Monday of the year 1934, it is *contained* as follows to May Term, 1934:

[fol. 2] No. 28, May Term, 1934

COMMONWEALTH OF PENNSYLVANIA ex Rel. WILLIAM A. SCHNADER, Attorney General,

vs.

PENN GENERAL CASUALTY COMPANY, Appellant

Appeal of Defendant from the Order and Decree of the Court of Common Pleas of Dauphin County

No. 343, Commonwealth Docket, 1933

Mar. 16, 1934.—Appeal and affidavit filed.
Eo die exit writ rtble. 21st Monday of the year 1934.
Mar. 22, 1934.—Notice of Appeal, etc., filed.
Apr. 4, 1934.—Petition to advance filed.
Apr. 5, 1934.—Assignments of error filed.

And now, to wit, this 5 day of April, A. D. 1934, upon consideration of the foregoing petition, the above-entitled appeal is transferred from the Middle District and argument of the same is hereby advanced to Eastern District during week of April 23, 1934.

Per Curiam: F.

And now, April 6, 1934, this case is hereby advanced to the Eastern District for argument during week of April 23, 1934 in accordance with above order.

Apr. 17, 1934.—Record filed.
Apr. 23, 1934.—Argued at Philadelphia.
Jun. 30, 1934.—Decree affirmed at appellant's cost.
Per Schaffer, J.

Jul. 10, 1934.—Motion for re-argument filed.

Record.

AMONG THE RECORDS AND PROCEEDINGS enrolled in the Court of Common Pleas in and for the County of Dauphin in the Commonwealth of Pennsylvania, to No. 343 Commonwealth Docket, 1934, is contained the following:

COPY OF COMMONWEALTH DOCKET ENTRY.

COMMONWEALTH OF PENNSYLVANIA, EX REL. WM. A. SCHNADER, ATTORNEY GENERAL,
v.
PENN GENERAL CASUALTY COMPANY.

Suggestion.

Dec. 8, 1933, on suggestion filed Rule granted on Defendant to show cause why the Insurance Commissioner of Pennsylvania should not liquidate its business.

Retb'le Dec. 18, 1933 at 10 o'clock A. M.

Dec. 11, 1933, Sheriff of Philadelphia County served Rule on J. V. Gosline, Vice-President of Defendant Company.

Dec. 14, 1933, Restraining order filed; same day it is ordered that the Defendant Company, its officers, agents, employees and servants are not only enjoined from the transaction of any business and from disposing of its property until further order of Court and also they are restrained and enjoined from surrendering possession or delivering or turning over any books, papers, Dockets or any assets whatsoever of the Defendant Company to any person other

than the Insurance Commissioner of Pennsylvania, his Deputies or agents.

Dec. 18, 1933, Answer of Defendant to suggestion filed with service of same accepted by Geo. W. Keitel, Dep. Attorney General.

Jan. 17, 1934, on motion filed it is ordered, adjudged and decreed that the restraining order entered as of Dec. 14, 1933 is hereby modified to the extent that the Defendant Company, its officers, agents, employees and servants are authorized to pay normal current operating expenses including Attorney fees, the restraining order in all other respects to be and remain in full force and effect. See file.

Feb. 27, 1934, Testimony filed.

Mar. 14, 1934, on petition filed it is ordered and decreed that Charles H. Graff, acting Insurance Commissioner, is directed to take possession of the business and property of the Defendant Company and liquidate the business, all persons having claims shall file proof with the Commissioner, not later than October 1, 1934.

Mar. 14, 1934, Defendant's Exceptions to order and decree and exception is sealed.

Mar. 16, 1934, Certiorari sur appeal #28 May Term, 1934, to Supreme Court received and filed.

Mar. 16, 1934, on petition filed the Court grants that the appeal taken may act as a supersedeas upon the filing of an approved Bond in the sum of ($1000.00).

Mar. 17, 1934, Approved Bond on appeal filed.

Mar. 19, 1934, Opinion filed.

Apr. 4, 1934. Statement of Facts. See file.

Apr. 4, 1934. Certificate of Amount in Controversy. See file.

STATEMENT OF THE CASE.

IN THE COURT OF COMMON PLEAS,
OF DAUPHIN COUNTY.

No. 343. Commonwealth Docket 1933.

Commonwealth of Pennsylvania, ex rel. William A. Schnader, Attorney General.

v.

Penn General Casualty Company.

It is agreed between the attorneys for the plaintiff and the defendant that all of the facts necessary to a determination of the question involved in the appeal of this case are as follows:

1. The defendant, Penn General Casualty Company, is a corporation organized under the provisions of the Act approved May 17, 1921, P. L. 682, providing for the incorporation of insurance companies. Said defendant was chartered on September 26, 1923, for the purpose of conducting a general casualty insurance business, and thereafter conducted said business in the Commonwealth of Pennsylvania and elsewhere according to the laws of the Commonwealth of Pennsylvania and the regulations made by the Insurance Commissioner of the Commonwealth of Pennsylvania.

2. On September 14, 1933, a hearing was held before the Insurance Commissioner at Harrisburg, pursuant to a citation by the Commissioner to the officers and directors of the defendant following the

receipt by the Commissioner of information to the effect that the assets of the defendant had been seriously depleted. At said hearing, C. B. Love, then President of the defendant, was ordered to return to the defendant all assets improperly removed and illegally invested by him.

3. On October 4, 1933, as a result of an examination of the defendant's affairs, the Insurance Commissioner summoned the officers and directors of the defendant to a formal hearing before the Attorney General to whom the Insurance Commissioner had communicated the facts concerning the unsafe and unsound condition of the defendant as disclosed by said examination. Said hearing was held on October 14, 1933, and thereafter, until December 8, 1933, the Insurance Commissioner conducted negotiations with stockholders of the company holding approximately 95 per cent. (95%) of the stock of the defendant, acting for themselves as individuals, looking to the financial rehabilitation of the defendant by said stockholders, and during said period the officers and directors of the defendant from time to time met with the Insurance Commissioner to assist wherever possible in saving the company.

4. On November 17, 1933, while such negotiations were pending, one Samuel Lando filed a bill in equity in the United States District Court for the Eastern District of Pennsylvania (for convenience, hereinafter referred to as "Federal Court"), to No. 7971, of September Term, 1933. Upon the filing of said bill, subpœna was issued and duly served upon the defendant on November 22, 1933.

The said bill alleges that the said Samuel Lando is a stockholder of the defendant company, and that he is a resident of the State of West Virginia. It is

also alleged that the amount involved in said suit is in excess of $3000.00, exclusive of interest and costs. The said Samuel Lando further alleges in said bill that certain officers of the defendant misappropriated and converted cash in the amount of $17,500.00, and that said officers withdrew cash and various securities, which latter were legal and proper investments, of a value of approximately $190,000.00 from the assets of the company, and illegally reinvested same in illegal and worthless securities, and that by reason of the said matters the capital, reserve, and surplus of the defendant have become so depleted that it is insolvent and in an unsafe and unsound condition to continue business.

Said bill prays (1) for the appointment of receivers to take charge and manage the property of the defendant; (2) that the receivers be authorized generally to take into their possession all assets of the defendant, and to institute all litigation necessary to collect assets of the company, as well as to defend all pending litigation against it; (3) that all officers and all other persons be required to deliver to the receivers all assets, books, and records of the company; (4) that the Court marshal the assets of the defendant, and ascertain the respective liens and priorities existing against the property of the defendant corporation, and the rights, liens, and equities of its creditors, stockholders, or other claimants; (5) that all persons generally be restrained from selling, transferring, or disposing of any property of the defendant or from intermeddling with its property and affairs; (6) that the receivers proceed with the care and management of the property until the further order of the Court; and (7) that the officers of the defendant be temporarily restrained from disposing of any of its assets otherwise than in the usual course of business until hearing.

5. On December 1, 1933, an application made to the Federal Court for a restraining order as prayed for in said bill was continued, sine die.

6. On December 8, 1933, the Attorney General of the Commonwealth of Pennsylvania filed a suggestion in the Court of Common Pleas of Dauphin County to No. 343 of Commonwealth Docket 1933, alleging that an examination of the affairs of the defendant company, as of July 31, 1933, disclosed that the defendant was in an unsafe and unsound condition, with the result that further transaction of business would be detrimental and hazardous to its policyholders, creditors, and the public. Said examination also disclosed "that certain officers of defendant company have dissipated portions of its assets by investing them in securities of doubtful value and that are not legal investments for the capital and reserves of insurance companies. Furthermore, such officers have appropriated to their own use other assets of defendant company and have otherwise conducted the affairs of defendant company in such manner as to render its condition such that its further transaction of business will be hazardous to its policyholders, or to its creditors or to the public." It is also alleged in said suggestion that the Insurance Commissioner ordered the officers who committed such illegal acts and made such illegal investments to make good the losses sustained by defendant company by reason thereof, but said officers have failed so to do, as a result of which there exists an impairment of defendant company's capital.

Said suggestion prays that the Court of Common Pleas of Dauphin County (for convenience, hereinafter referred to as "Common Pleas Court") grant an order on the defendant to show cause why its business should not be closed, its charter vacated, its assets taken into the possession of the Insurance Commis-

sioner, and that an order be entered liquidating the company under the direction of the Insurance Commissioner. Said suggestion also prayed for a preliminary injunction enjoining the defendant from transacting business and disposing of its assets until further order of the Court.

7. On December 8, 1933, the Common Pleas Court entered an order to show cause on the defendant, as prayed for in said suggestion; returnable December 18, 1933. Said order to show cause enjoined the defendant "from the transacting of business and from disposing of its property until further order of this Court."

8. On December 11, 1933, said suggestion and order to show cause were duly served upon the defendant.

9. On December 14, 1933, the defendant filed an answer to the said suit instituted by Samuel Lando in the Federal Court denying that the plaintiff in said suit was a resident of Wheeling, West Virginia, and denying that he was the registered owner of four (4) shares of stock, as alleged. The answer substantially admitted the allegations as to the alleged withdrawal of assets and the illegal investment as alleged. The answer denied insolvency, and averred that the defendant was in position to continue the conduct of its business, and meet its obligations as they matured. It was denied that the present management was improper, as the offending parties no longer had control of the affairs of the defendant company. The answer further alleged the filing of the suggestion by the Attorney General, and the pendency of the proceedings thereunder.

10. On December 14, 1933, the Common Pleas Court issued a further restraining order against the defendant, which is as follows:

"And Now, to wit, this 14 day of December, A. D. 1933, on application of William A. Schnader, Attorney General of the Commonwealth, rule having been granted and served upon the above named defendant, returnable Monday, December 18, A. D. 1933, and upon filing of the suggestion under which said rule was granted, and upon further consideration thereof,

"It is hereby ordered that Penn General Casualty Company, its officers, agents, employes and servants are not only enjoined from the transaction of business and from disposing of its property until further order of this Court, but they and each of them are hereby restrained and enjoined from surrendering possession of, delivering or turning over any of the books, papers, checks, records, documents or any assets whatsoever of said Penn General Casualty Company to any person or persons other than the Insurance Commissioner of the Commonwealth of Pennsylvania, his deputies, agents or representatives, or such other person or persons as may be designated by this Court;

"And it is further ordered that pending the hearing on the suggestion filed, any and all persons whatsoever, other than the Insurance Commissioner of the Commonwealth of Pennsylvania, his deputies, agents or representatives, are hereby restrained and enjoined from in any manner taking possession of or custody over any of the books, papers, checks, records, documents or assets of the said defendant, Penn General Casualty Company, without authority and direction of this Court.

By The Court,
Frank B. Wickersham,
A. L. J."

On December 15, 1933, said restraining order was duly served on the defendant.

11. On December 15, 1933, the Federal Court, on the application of Samuel Lando, issued a restraining order, which is as follows:

"And Now, to wit, 15th December, A. D., 1933, this matter having come on to be heard on motion of the Complainant for a restraining order, and it appearing to the Court that the Bill in this case was filed November 17, 1933 and previous application for restraining order continued at the request of all parties in interest, including the Deputy Attorney General of the State of Pennsylvania, for the submission of a possible plan of reorganization, and it further appearing that without notice to counsel for the Complainant, on December 8, 1933, the Attorney General of the State of Pennsylvania filed a Petition in the Dauphin County Court of said State upon which was granted an Order on the Defendant to show cause why it should not be taken in possession of the Insurance Commissioner of the State of Pennsylvania, its affairs liquidated and charter rights forfeited and ousted, which rule is returnable the 18th day of December, 1933;

"It Is Hereby Ordered and Decreed: That the defendant corporation and each and every of its officers and all persons in possession of its books, papers, records and assets are hereby restrained and enjoined from permitting any one to receive or take possession thereof. All said persons are further ordered to hold and maintain such possession until further order of this Court or until proceedings before it have been determined, and all persons are hereby enjoined from interfering in any way with the present possession of the books, papers, records and assets, and business of the Defendant.

By The Court:

Welsh, *J.*"

Said restraining order was duly served on the defendant on December 15, 1933, subsequent to the service of the order of the Common Pleas Court.

12. On December 18, 1933, the defendant filed an answer to the suggestion of the Attorney General denying that the report of the Insurance Commissioner showed that the capital of the company was impaired, and denying that the transaction of further business would be detrimental or hazardous. Said answer also avers the pendency of the aforesaid suit of Samuel Lando against the defendant in the Federal court.

13. On January 17, 1934, hearing was held in the Common Pleas Court, and testimony taken in support of the suggestion filed by the Attorney General, which testimony sustained the allegations of said suggestion.

14. On March 14, 1934, a final decree was entered by the Common Pleas Court appointing Charles H. Graff, Acting Insurance Commissioner, as liquidator, to take possession of the business and property of the defendant and to liquidate the same.

15. On March 15, 1934, said decree was duly served on the defendant and demand made upon it by the said liquidator, through his agents, to surrender its property in conformity with the decree of the Common Pleas Court. The defendant refused to comply with said demand, in view of the restraining order of the Federal court.

16. No receivers have been appointed by the Federal Court in the suit of Lando against the defendant, nor has any final hearing been held on the bill and answer.

17. The relief sought in the above-mentioned suits pending in the Common Pleas Court and the Federal Court is that of the winding up and liquidation of the assets of the defendant company.

18. The question to be determined in this appeal is whether the Common Pleas Court, in view of the prior pendency of the said suit of Lando in the Federal court, had jurisdiction to enter the decree from which this appeal is taken.

HAROLD D. SAYLOR,
Deputy Attorney General, for Wm. A. Schnäder, Attorney General.
PAUL G. SMITH,
Attorney for Defendant.

First Assignment of Error

ORDER AND DECREE.

AND NOW, 14th March, 1934, it appearing to the Court that the Attorney General of the Commonwealth of Pennsylvania, at the relation of the Insurance Commissioner of the Commonwealth of Pennsylvania, has filed herein a suggestion, dated November 21, 1933, praying for a rule upon defendant, Penn General Casualty Company, to show cause why the Insurance Commissioner of the Commonwealth of Pennsylvania should not take possession of its property and order the dissolution of the said company and order the liquidation of its business by the Insurance Commissioner and grant to him and to the policyholders and creditors of said company such other and further relief as in the premises may be just and equitable, and it appearing that return of service on defendant of the rule to show cause and a copy of the suggestion and order herein filed has been made, and that defendant

has appeared by counsel and has filed an answer to the said suggestion, and it further appearing to the Court, after hearing, that said Penn General Casualty Company is in such a condition that its further transaction of business will be hazardous to its policyholders, its creditors and the public:

It is hereby ordered, adjudged and decreed that the said Penn General Casualty Company, a corporation chartered and existing under the laws of this Commonwealth, be and the same is hereby dissolved, its charter vacated and its corporate existence ended; that Charles H. Graff, Acting Insurance Commissioner of the Commonwealth of Pennsylvania as liquidator be and he is hereby directed to take possession of the business and property of the defendant, Penn General Casualty Company, and liquidate the affairs thereof in accordance with the provisions of the Act of the General Assembly of May 17, 1921, P. L. 789; that all parties having claims against the said company shall file proof thereof with the Insurance Commissioner not later than October 1, 1934, or they shall thereafter be barred as claimants against any fund in the hands of said Insurance Commissioner, who is hereby ordered to give reasonable notice to all known parties having claims against said defendant.

It is hereby further ordered that this order shall take effect upon its entry in the office of the Prothonotary.

By THE COURT:

(Sgd.) WATSON R. DAVISON,
President Judge, Thirty-ninth Judicial District, Specially Presiding.

First Assignment of Error

DEFENDANT'S EXCEPTION TO ORDER AND DECREE.

And Now, March 14, 1934, counsel for the defendants hereby excepts to the order and decree this day entered in the above case and, at the defendant's request, an exception is sealed thereto.

By THE COURT:

Frank B. Wickersham,
A. L. J.

OPINION

Sur Suggestion to Show Cause Why the Defendant Company Should Not Be Taken Into Possession by the Insurance Commissioner.

Per Curiam:

The Penn General Casualty Company is a corporation of the Commonwealth of Pennsylvania, organized and created under the provisions of the Act of Assembly, approved May 17, 1921, P. L. 682, providing for the incorporation and regulation of insurance companies, it having been chartered on September 26, 1923, for the purpose of conducting a general casualty insurance business. It commenced the transaction of casualty insurance business within this Commonwealth on December 1, 1923, and has continued in such business to this time, except as restrained in the orders of court hereinafter referred to, its principal office being located at No. 242 South Thirteenth Street in Philadelphia, Pa.

On the 8th day of December, 1933, a suggestion was filed by the Attorney General of the Commonwealth in this court in which it was alleged that an investigation

and examination of the company by the Insurance Commissioner of the State disclosed that it is in an unsafe and unsound condition and that the further transaction of business by the company would be detrimental to its policy holders, creditors, and the public; and, further, that certain officers of the company had dissipated portions of the assets by investing in securities of doubtful value which were not legal investments for the capital and reserves of insurance companies, and, also, that such officers have appropriated to their own use assets of the company, and have otherwise conducted its affairs as to render its condition such that its further transaction of business will be hazardous to its policy holders, or its creditors or the public. Said suggestion also alleged that at a hearing held in the office of the Insurance Commissioner on October 14, 1933, it was established that the further transaction of business by said defendant corporation would be hazardous to its policy holders, creditors, and the public. The Attorney General, therefore, applied to this court, "for an order directing the said Penn General Casualty Company to show cause why its business should not be closed and the Insurance Commissioner should not take possession of its property and its charter vacated, and for an injunction restraining Penn General Casualty Company from the transaction of any business or the disposition of its property until further order of this court, and after a full hearing by said court, to order liquidation of the business and affairs of the said defendant corporation to be made by and under the direction of the said Insurance Commissioner, and for such other relief as the nature of the case and the interests of the policyholders of the defendant corporation, its creditors and the public may require."

On December 8, 1933, this court made the following order on such suggestion:

"And now, to wit, Dec. 8, 1933, upon consideration of the foregoing suggestion and upon motion of William A. Schnader, Attorney General, a rule is granted upon said Penn General Casualty Company, returnable December 18, 1933, at 10 o'clock A. M., to show cause why its business should not be closed and the Insurance Commissioner of Pennsylvania should not take possession of its property, and further, why the court should not order the liquidation of the business of said corporation to be by and under the direction of the said Insurance Commissioner and the dissolution of the corporation, and grant such other relief as the nature of the case and the interests of its members, policyholders, creditors and the public may require, and said Penn General Casualty Company is hereby enjoined from the transaction of business and from disposing of its property until further order of this court."

To this rule so granted an answer was filed by said defendant company denying that said company was in an unsafe and unsound condition, but averring that the report of the examination made by the Insurance Commissioner shows that the company is solvent, able to pay its creditors in the usual course of business, and that its capital is not impaired and that there is a surplus of assets over and above its liabilities, including its capital stock, and denying that the further transaction of business by the defendant would be detrimental or hazardous to its policy holders, creditors or the public. Said answer also informed this court that on or about November 18, 1933, a bill in equity was filed by Samuel Lando against the defendant company in the United States District Court for the Eastern District of Pennsylvania, No. 7971, September Term, 1933, complaining of the matters set forth in the present suggestion and praying for the appointment of a receiver, and that an answer had been filed by the defendant to

that bill, and that Judge Welsh of that court had on December 15, 1933, filed a restraining order. The defendant company for said reasons prayed for the dismissal of the present rule. The order of said United States District Court is as follows:

> "It is hereby ordered and decreed: That the Defendant corporation and each and every of its officers and all persons in possession of its books, papers, records and assets are hereby restrained and enjoined from permitting any one to receive or take possession thereof. All said persons are further ordered to hold and maintain such possession until further order of this court or until proceedings before it have been determined, and all persons are hereby enjoined from interfering in any way with the present possession of the books, papers, records and assets, and business of the defendant."

On December 14, 1933, an order of this court was filed as follows:

> "It is hereby ordered that Penn General Casualty Company, its officers, agents, employes and servants are not only enjoined from the transaction of business and from disposing of its property until further order of this court, but they and each of them are hereby restrained and enjoined from surrendering possession of, delivering or turning over any of the books, papers, checks, records, documents or any assets whatsoever of said Penn General Casualty Company to any person or persons other than the Insurance Commissioner of the Commonwealth of Pennsylvania, his deputies, agents or representatives, or such other person or persons as may be designated by this court;
>
> "And it is further ordered that pending the hearing on the suggestion filed, any and all persons whatsoever, other than the Insurance Commissioner of the Commonwealth of Pennsylvania, his deputies, agents, or representatives, are hereby

restrained and enjoined from in any manner taking possession of or custody over any of the books, papers, checks, records, documents or assets of the said defendant, Penn General Casualty Company, without authority and direction of this court."

This order of the court was modified on January 17, 1934, to the extent that the Penn General Casualty Company, its officers, agents, employees, and servants, were authorized to pay normal current operating expenses including attorney fees.

On January 17, 1934, a hearing was held before this Court and evidence taken on said rule.

This proceeding is instituted by the Attorney General by virtue of the Act of May 17, 1921, P. L. 682, Section 502, which provides as follows in so far as it applies to the present matter: "Whenever any domestic insurance company, association, exchange, society, or order, including all corporations, associations, societies, and orders which are subject to examination by the Insurance Commissioner or which are doing, or attempting to do, or representing that they are doing the business of insurance in this Commonwealth, or which are in process of organization intending to do such business therein—(a) is insolvent, or . . . (e) is found, after an examination, to be in such condition that its further transaction of business will be hazardous to its policyholders, or to its creditors, or to the public, . . . the Insurance Commissioner shall communicate the facts to the Attorney General, who shall, after hearing, apply to the court of common pleas of Dauphin County, . . . for an order directing such company, association, exchange, society, or order to show cause why its business should not be closed, and the Insurance Commissioner should not take possession of its property and conduct its business, and for such other relief as the nature of the case and the inter-

ests of its policyholders, creditors, stockholders, or the public may require."

Said Act also provides in Section 505 and in Section 506, in part, as follows:

> "On such application, or at any time thereafter, such court may, in its discretion, issue an injunction restraining such company, association, exchange, society or order from the transaction of its business or disposition of its property until the further order of the court. On the return of such order to show cause, and after a full hearing before the court or before an examiner appointed by the court, the court shall either deny the application or direct the Insurance Commissioner forthwith to take possession of the property and conduct the business of such company, association, exchange, society or order."

> "If, on a like application and order to show cause, and after a full hearing, the court shall order the liquidation of the business of such company, association, exchange, society, or order, such liquidation shall be made by and under the direction of the Insurance Commissioner, who shall be vested by operation of law with title to all of the property, contracts, and rights of action of such company, association, exchange, society, or order as of the date of the order so directing him to liquidate."

The question, therefore, now before this court is whether the evidence taken before us has proven that the defendant company is (a) insolvent or (e) is found, after examination, to be in such condition that its further transaction of business will be hazardous to its policy holders, or to its creditors, or to the public. If either of these things are found to exist, the rule must be made absolute; if none of them, it must be discharged.

From the evidence it is certain that the affairs of the defendant company have been grossly mismanaged

and its assets badly invested and some of them used for private purposes by certain officer or officers of the same, and it is shown without a doubt that by reason of these acts it is insolvent, or so near insolvency that it is in the condition contemplated in paragraph (e) of Section 506 of that Act, and we are fully satisfied that the relief prayed for should be granted and the Insurance Commissioner placed in possession of the property of the company.

An examination made of the company for the Insurance Department by Earl E. Moyer, Chief Casualty Examiner as of July 31, 1933, and filed with the department as completed in a report dated December 13, 1933. That report shows under head of "Remarks":

> "In conclusion, this examination discloses that as of July 31, 1933, the Penn General Casualty Company of Philadelphia, Penna., possessed, on a market value basis, Total Admitted Assets of $915,581.08, while Total Liabilities, including Capital of $250,000.00, amount to $933,456.32, resulting in a deficit of $17,875.24, however, excluding the liability for paid up capital a surplus as regards policyholders of $232,124.76 is established.
>
> "In addition to the foregoing the Department has knowledge of a disbursement made under date of August 10, 1933 to Mr. C. B. Love, President of the Company, in the amount of $17,500.00, and that to date said amount has not been accounted for. This transaction, of course, occurred subsequent to the date of the financial statement included in this report, but if considered, the deficit would be increased to $35,375.24, and the surplus as regards policyholders would be reduced to $214,624.76."

In addition to that, Mr. Moyer testified that since that report he had learned that the note of A. S. Nye for $35,000.00, with collateral of a par value of $50,000.00, and which had been valued at $20,000.00 in

said assets of said report, had been rehypothecated and there is a possibility that this collateral was absolutely worthless, and if so the Nye note would have no value whatever, and this would add another $20,000.00 to the deficit of the company, and make a deficit of some $55,000.00, and then, the capital would be impaired to the extent of twenty per cent.

Included in the assets as set out in said report and as testified to before the court is an item of $128,976.17, referred to in the evidence as agents' balances representing premiums not more than ninety days old, and in the report as "On policies or renewals effective on or after May 1 of current year". It is testified to by Mr. Moyer that these balances are hard to collect and of doubtful value.

The evidence showed that the president of the Company, C. B. Love, had invested certain of the money of the defendant company without authority of the Board of Directors. One of such investments was $225,000.00 in the capital stock of the General International Corporation, which corporation was controlled by himself, and this amount is considered as lost in the said report filed. In addition there was a withdrawal of $17,500.00 from the funds of the company by him. There was an investment of $65,000.00 in ten notes of the Underwriters' Finance Corporation, which it is testified to have little, or no value; and there was the Nye note above referred to. It is true that Love has by resolution of the board of directors been suspended as president of the company, but the harm which has been done is reflected in the financial condition of the company and bears on the ability of that company to continue to operate with safety to its creditors and others.

We find that clearly the defendant company is insolvent when all its liabilities are considered, including the capital stock of the company which must be considered in determining the solvency of a corporation.

In addition to that we are of the opinion that, if we do not consider the capital stock liability and, therefore, the company is not actually insolvent in so far as other liabilities are concerned, the assets are of such a nature, and some of them of such an uncertain value, that they do not afford that protection which should exist in a going concern of this nature, and with the importance of these assets to the class of people to whom they are intended to provide relief and help. These insurance companies must be held to a high order of responsibility by the Commonwealth so that those dependent on them in time of need may not be disappointed. The management of this company in the past short time has not been such as to invite confidence, and while we would have confidence in its affairs when managed by Mr. Gosline, it is almost impossible to bring back to the public a belief in an institution which has been mismanaged as has this one and in which the assets are as uncertain as in this case. We are, therefore, of the opinion that this company is in such condition that its further transaction of business would be hazardous to its policy holders, creditors and the public. The best interest of all will be served by the Insurance Department taking over the assets of the company and liquidating it.

We have referred to the bill in equity filed in the United States District Court, and the restraining order made by Judge Welsh in that proceeding. We are of the opinion that this action on the part of that court does not affect the proceeding before us in any way. This court, a court of the Commonwealth of Pennsylvania, has full, complete and sole authority over the affairs of this corporation, which is chartered under the laws of Pennsylvania, doing business in this State, having its principal office in this State, and being subject to and regulated by the laws of the State. We are of the opinion that the said District Court does not have

the jurisdiction which it has assumed, and that, therefore, the action of this court is not in any way bound or restricted by the proceedings in said District Court. We take this position with all due deference to said court and its learned judge, but with the opinion that in the instant case we alone have power to act in the premises.

Being of the opinion, therefore, that the defendant company is insolvent, and further that its condition is such that its further transaction of business would be hazardous to its policy holders, creditors and the public, we will grant the relief prayed for and make the rule heretofore granted absolute and direct the Insurance Commissioner forthwith to take possession of the property of the said company.

(Sgd.) Watson R. Davison,
President Judge, Thirty-ninth Judicial District. Specially presiding.

[fol. 25] STATEMENT OF QUESTION INVOLVED

A Bill in Equity was filed against an Insurance Company, a Pennsylvania Corporation, in the United States District Court by a non-resident stockholder thereof alleging that by reason of certain acts of mismanagement and misappropriation said corporation was insolvent and that it was unable to continue its business. Said Bill prayed for the appointment of receivers and for a liquidation and winding up of the affairs of said corporation. While said Bill was pending and undetermined and before the appointment of receivers thereunder, the Attorney General filed a suggestion in the Court of Common Pleas of Dauphin County alleging that the said corporation, by reason of various acts of mismanagement and misappropriation, was in such an unsafe and unsound condition that the further transaction of business would be hazardous to its policy holders and creditors. Said Common Pleas Court issued a rule to show cause why the said corporation should not be liquidated under the supervision of the Insurance Commissioner and its charter vacated. After a final hearing on said suggestion and rule, said Court entered a final decree appointing the Insurance Commissioner as Liquidator and vacated the charter of said corporation. In view of the prior pendency of the proceedings in the Federal Court, did the said Common Pleas Court have jurisdiction to enter its decree?

Affirmed.

[fol. 26] IN THE SUPREME COURT OF PENNSYLVANIA, MIDDLE DISTRICT, MAY SESSIONS, 1934

No. 28

COMMONWEALTH OF PENNSYLVANIA ex rel. WILLIAM A. SCHNADER, Attorney General,

vs.

PENN GENERAL CASUALTY COMPANY, Appellant

[fol. 27] ASSIGNMENT OF ERROR

The Appellant files the following Assignment of Error:

1. The Court below erred in entering its final decree dissolving the Appellant and vacating its charter; in appoint-

ing the Acting Insurance Commissioner as Liquidator; and in directing that he take possession of the business and property of the Appellant and liquidate its affairs in accordance with the Act of the General Assembly, approved May 17, 1921, P. L. 789.

This Assignment is filed in this form in pursuance of Rule 36. The decree in full is to be found in the record (11a, 12a).

Rawle & Henderson, by Thomas F. Mount, Attorneys for Appellant.

[fol. 28] [Endorsement:] In the Supreme Court of Pa., Middle District. No. 28, May Sessions, 1934. Commonwealth of Pennsylvania, ex Rel. William A. Schnader, Attorney General, vs. Penn General Casualty Company, Appellant. Assignment of Error. Filed in Supreme Court Apr. 5, 1934. Middle District. Rawle & Henderson, Packard Building, Philadelphia.

[fol. 29] In the Supreme Court of Pennsylvania, Middle District, May Term, 1934

No. 28

Commonwealth of Pennsylvania ex rel. William A. Schnader, Attorney General,

v.

Penn General Casualty Company, Appellant

Appeal from Decree of Court of Common Pleas of Dauphin County, No. 343, Commonwealth Docket, 1933

Opinion of the Court

Schaffer, J.:

This case involves a conflict of jurisdictions between the State and Federal Courts in the winding up of the affairs of an insolvent insurance company. The appeal is by the company from the decree of the Court of Common Pleas of Dauphin County making absolute a rule to show cause why the appellant should not be dissolved, its charter vacated and its affairs liquidated by the Insurance Commissioner,

who was directed by the decree forthwith to take possession of the property of the company. The position of appellant is that as a proceeding had been commenced against it in the Federal Court prior to the action in the State tribunal, the latter's jurisdiction was ousted.

Appellant is a Pennsylvania corporation organized under the Insurance Company Law of May 17, 1921, P. L. 682, 40 P. S. sec. 341. It conducted its business under the supervision and regulation of the Insurance Commissioner. On September 14, 1933, pursuant to a citation by the Commissioner, appellant's officers and directors attended a hearing before him, at which the president of the company was ordered to return to it assets he had improperly removed and illegally invested to the serious impairment of its financial stability. On October 14, 1933, a hearing was held before the Attorney General, at which it was established that the further transaction of business by the company would [fol. 30] be hazardous to its policy holders, its creditors and the public. Thereafter negotiations were conducted by the Commissioner with the stockholders of the company in an effort to rehabilitate it and to place it in position to resume business. Pending these negotiations, on November 17, 1933, a resident of West Virginia, claiming to hold four shares of appellant's capital stock, filed in the United States District Court for the Eastern District of Pennsylvania a bill in equity for the appointment of receivers for the company and its liquidation. On December 8, 1933, while that bill was pending, the Attorney General of Pennsylvania filed in the court below his petition averring appellant to be in such condition that its further transaction of business would be detrimental and hazardous to its policy holders, creditors and the public. The same day the court below issued an order enjoining appellant from transacting business and disposing of its property. On December 14, 1933, appellant filed an answer in the District Court proceedings denying that the complainant was a resident of West Virginia and that he was the registered owner of four shares of its stock. On the same date the court below issued a further order restraining appellant from surrendering possession of any of its books or assets to any person other than the Insurance Commissioner. The following day, December 15, 1933, the Federal Court, on the application of complainant's counsel, issued its restraining order of substantially similar import. On December 18, 1933, appellant

filed a denying answer to the petition of the Attorney General and set up the pendency of the bill against it in the Federal Court. Thereafter a hearing was held in the court below at which the Attorney General presented testimony sustaining the allegations of his petition. Appellant offered no defense. Subsequently the court below entered the decree from which this appeal was taken.

The position of appellant is that both courts have concurrent jurisdiction over it and that as the jurisdiction of the Federal Court first attached, its jurisdiction is now ex- [fol. 31] clusive. It furthermore points out that the Act of May 17, 1921, P. L. 789, 40 P. S. sec. 201, does not in terms confer exclusive jurisdiction on the State Court. We think the latter fact of little or no consequence for the reason that if the Federal Court has jurisdiction, its cognizance of the actions could not be ousted by a State statute declaring that its courts have exclusive jurisdiction.

Pennsylvania has provided a most complete system for the regulation and liquidation of insolvent insurance companies and the winding up of their affairs in "The Insurance Department Act of 1921", approved May 17, 1921, P. L. 789, 40 P. S. sec. 1, and "The Insurance Company Law of 1921", approved May 17, 1921, P. L. 682, 40 P. S. sec. 341. Speaking of the former act, we said in Com. v. Equitable Casualty & Surety Co., 306 Pa. 19, that it is a comprehensive statute regulating the business of insurance in the Commonwealth. Section 201 (40 P. S. sec. 41) establishes the insurance department and charges it with the execution of the laws of the Commonwealth in relation to insurance. Section 213 (40 P. S. sec. 51) directs the Commissioner to require every domestic insurance company to keep its books and records in such manner that his representatives may readily verify its annual statements and ascertain whether it has complied with the provisions of the law. The statute requires him to examine each company at least once in three years to ascertain its financial condition, its ability to fulfill its obligations, and its compliance with the provisions of law. Section 502 (40 P. S. sec. 202) provides that whenever any domestic insurance company is insolvent, or has refused to submit its books, &c., to the inspection of the Commissioner, or has neglected or refused to observe an order made by him to make good a deficiency in its capital or transferred its property or merged with another company without the Commissioner's ap-

proval, or if found after examination to be in such condition that its further transaction of business will be hazardous, or has violated its charter or any law of the Common-
[fol. 32] wealth, or whenever any officer has refused to be examined under oath touching its affairs, the Commissioner shall communicate the facts to the Attorney General, who shall after hearing apply to the Court of Common Pleas of Dauphin County or the court of the county in which the principal office is located for an order directing such company to show cause why its business should not be closed and the Commissioner should not take possession of its property and conduct its business and for other relief. Section 507 (40 P. S. sec. 207) provides that if any receiver of an insurance company is appointed on motion of the Attorney General at the instance of the Insurance Commissioner, such receiver shall supersede any receiver previously appointed by the decree of any court of this Commonwealth.

An examination of all the insurance statutes shows that they provide a complete system for the incorporation, management, supervision and liquidation of insurance companies created under the laws of this Commonwealth. In view of this situation and having due regard for the comity which should exist between the Federal and State Courts, it would seem that the former should not take jurisdiction to liquidate and wind up domestic insurance companies when the complete machinery to do so has been set up by the State. At the very time the Federal Court asserted its jurisdiction, the Insurance Commissioner was exercising his full prerogatives over the appellant.

There is and ought to be a wide difference between the jurisdiction of the Federal Courts over the generality of corporations and over those of a quasi-public character where the State creating them, because of their public nature, has provided a complete system for their liquidation by its public officers. If insurance companies are to be liquidated through the Federal Courts, so may State banks and building and loan associations. Such corporations have been differentiated from others in Federal legislation. They are not subject to the Bankruptcy laws. Act of Feb-
[fol. 33] ruary 11, 1932, c. 38, 47 Stat. 4, 11 U. S. C. A. sec. 22.

The only grant of power to the United States which can be invoked to vest jurisdiction in its courts for the liquida-

tion of such corporations as the appellant is Article III, section 2 of the Constitution, which provides: "The judicial power shall extend * * * to controversies * * * between citizens of different states." This language is carried into the Judicial Code (R. S. secs. 563, 629; 28 U. S. C. A. sec. 41). Both Constitution and Code require that there must be a controversy." Under the system of supervisory regulation over insurance companies established by the laws of Pennsylvania there cannot be a controversy in the State courts between a stockholder and an insurance company regarding the liquidation thereof. The power to liquidate insurance companies rests solely in the Insurance Commissioner. A citizen of Pennsylvania cannot, by bringing a bill in equity in a Pennsylvania court against a Pennsylvania insurance company, prevent the Insurance Commissioner from liquidating. If the District Courts of the United States have jurisdiction in cases such as the pending one, a citizen of another state would have rights superior to those of a citizen of Pennsylvania.

As we read the decisions of the Federal Appellate Courts, jurisdiction in situations similar to the present one has been disclaimed by those tribunals. In Port Newark Nat. Bank of Waldron, 56 Fed. (2d) 296, a District Court appointed a receiver to take charge of the affairs of a national bank. The Comptroller of the Currency thereafter appointed a receiver under the provisions of the United States statutes. The Comptroller then appealed from the decree appointing the first receiver. In the course of his opinion reversing the District Court, Judge Buffington of the Circuit Court of Appeals said, page 299: "* * * in the present case we regard the Comptroller at the time this bill was filed as having complete dominion over, and, by his bank examiner, full legal control of, the then and future operations of the bank, and that such situation might ulti- [fol. 34] mately require the appointment of a receiver. Consequently, the court below, when the bill was filed, acquired no jurisdiction to shear the Comptroller of the statutory power to take the further step of appointing a receiver in case insolvency existed and the attempted sale fell through."

In Lyon v. McKeefrey, 171 Fed. 384, the Circuit Court of Appeals for the Third Circuit had before it the question of the jurisdiction of a District Court to appoint receivers and liquidate a Pennsylvania State bank. At page 393,

Judge Gray said: "But the court below has clearly exhausted its jurisdiction, so far as the purposes of the original bill are concerned. That bill did not contemplate a dissolution of the corporation and a winding up of its business, indeed the court was without jurisdiction for that purpose." In that case the bill had been amended after it was originally filed so as to include a prayer for a winding up of the bank and the distribution of its assets. In that connection, the learned judge said, page 393: "But, apart from the propriety of allowing the amendment (a matter largely within the discretion of the court) it is clear that the court could not grant the prayer of the bill as amended." Referring to the nature of the corporation involved and the consequent relationship of the State to it, Judge Gray said: "The defendant corporation was a creature of the laws of Pennsylvania, and by those laws the rules governing its existence were prescribed. The measure of control to be exercised over its own corporations was determinable by the law and policy of the state to which they owed their being. By the legislation here in question, the State of Pennsylvania has seen fit to subject such corporations to supervision and administrative control and has ordained the proceedings, partly administrative and partly judicial, by which the life of such corporations may be determined and their affairs wound up and liquidated. The judicial proceeding is not one that may be instituted by private parties, but by the Attorney General of the State, acting on behalf of the Commonwealth and in the [fol. 35] interest of the public. Such a proceeding is not one of which a United States court can have concurrent jurisdiction. It does not involve a controversy between private parties, whether citizens of the same state or of different states."

In Mitchell v. Lay, 48 Fed. (2d) 79, Judge Wilbur of the Ninth Circuit reversed the District Court and directed a receiver already appointed to turn over the assets of an insurance company to the State Insurance Commissioner as soon as the Commissioner "has secured an appointment as receiver thereof in the action now pending in the State court." In Lee v. Edmunds, 66 Fed. (2d) 122, 125, the Circuit Court of Appeals of the Fifth Circuit said: "The decisions of this Court have agreed with those of the Supreme Court of Florida that only in a clear case of mismanagement will a court of equity take the assets from

the statutory administration. * * * Yet a court of equity in case of necessity may appoint a receiver for special property in the liquidator's hands, but only on a showing of fraud, corruption, or maladministration or other illegal action of the liquidator." In Bank of Bay Biscayne v. Hankins, 42 Fed. (2d) 209, the District Court appointed a receiver to control the assets of an insolvent state bank in place of the State Comptroller of Florida acting under statutory authority. The Circuit Court of Appeals in reversing the District Court's action and remanding the case with directions to dismiss the bill, said at page 210: "Regardless of the terms used, it is apparent that the order in effect appoints a receiver to control the assets of the failed bank, and enjoins the Comptroller from carrying on the liquidation of the institution under the provisions of the laws of Florida. A bank organized under the laws of a State is a quasi-public institution, and, whenever the laws of the State provide for supervision and control of the affairs of the bank by an authorized official, and also for the ultimate liquidation and distribution of its assets under his direction, in the event of its insolvency, it is a matter of grave consequence for any court to inter-[fol. 36] fere. * * * The laws of Florida provide an orderly method of liquidating the affairs of an insolvent State bank, in substantially the same manner that Federal statutes provide for the liquidation of an insolvent national bank. * * * It is usually a matter of discretion to issue an injunction and appoint a receiver, but the exercise of jurisdiction and the entering of the order appealed from in this case appear to us to be unwarranted."

In O'Neil v. Welch, 245 Fed. 261, the Circuit Court of Appeals of the Third Circuit had for consideration Pennsylvania's right to administer the affairs of the insurance companies through its Insurance Commissioner. The Commissioner through the Attorney General had proceeded in the State court under the State statute against a Pennsylvania insurance company. Thereafter, a nonresident stockholder filed a bill in the District Court, alleging insolvency and asking for the appointment of a receiver. The defendant company filed a consent answer. The day before the proceedings in the State court came to a hearing upon a rule theretofore granted, the District Court appointed a receiver. The Attorney General thereupon filed a petition in that court to vacate the appointment. The District

Court dismissed the petition and on appeal the Circuit Court of Appeals reversed. Judge Woolley, in writing the opinion, said at page 267: "The State engaged in this undertaking primarily for the protection of the public. Being for the public, its action is a governmental function. When in its exercise it becomes necessary to protect the public from insolvent or improperly conducted insurance companies, the State pursues a remedy prescribed by the same law that conferred the corporation's rights and defined the State's duties. Given briefly, the Insurance Commissioner, acting through the Attorney General, filed in a State court a suggestion of the corporation's insolvency or unlawful conduct. In this way the State acts and in this way the State begins suit. Upon the State's suggestion the court starts a judicial inquiry by directing to the insurance company a rule to show cause why the Insurance Commissioner should not take possession of its property, and at [fol. 37] the same time (that is at the very beginning of the suit) the court, if it wishes, lays its hand upon the company's property, and by a restraining order holds it within its control pending the inquiry. The jurisdiction of the State court thus invoked is a special jurisdiction conferred by statute as a part of the State's policy of insurance regulation and control. It is not conferred for the protection of corporations' policyholders and creditors alone, but for the protection of the public as well. This clearly appears by the terms of the act; it again appears in the court's decree. In prosecuting an insurance company the State is acting for the public, and the public is in turn interested in the proceeding; though not nominally present as a party it is nevertheless present in the person of the Attorney General."

In Shapiro v. Wilgus, 287 U. S. 348, where the receivership was obtained by a filing of a consent decree, the Supreme Court of the United States gave warning against the abuse of the practice of appointing Federal receivers upon a consent answer, where the application is predicated on diversity of citizenship. The court said, page 356: "We have given warning more than once, however, that the remedy in such circumstances is not to be granted loosely, but is to be watched with jealous eyes. * * * Never is such a remedy available when it is a mere weapon of coercion, a means for the frustration of the public policy of the state or the locality." The filing of the bill in this case

by the alleged stockholder of the company in the Federal Court was an obvious effort to frustrate the public policy of Pennsylvania.

Believing as we do that the Federal Court was without jurisdiction and that the action of the court below was proper, we affirm the decree at appellant's cost.

[fol. 38] [Endorsement:] # 215. In the Supreme Court of Pennsylvania, Middle District. No. 28, May Term, 1934. Commonwealth of Pennsylvania, ex rel. William A. Schnader, Attorney General, v. Penn General Casualty Company, Appellant. Appeal from Decree of Court of of Common Pleas of Dauphin County. Argued April 23, 1934. Decree affirmed at appellant's cost. Schaffer, J. Filed in Supreme Court, Jun. 30, 1934. Philadelphia.

[fol. 39] In the Supreme Court of Pennsylvania, Middle District, May Term, 1934

No. 28

Commonwealth of Pennsylvania, ex rel. William A. Schnader, Attorney General,

vs.

Penn General Casualty Company, Appellant

Motion for Re-argument

The appellant, Penn General Casualty Company, by its attorneys, Rawle & Henderson, respectfully moves for a re-argument of the above entitled case, and assigns the following reasons:

I. We submit that your Honorable Court, in deciding that the Federal Court had no jurisdiction of the suit brought by Lando against the appellant, has misconstrued Article III, Section 2 of the Constitution of the United States and the Judicial Code (28 U. S. C. A. 41) which fix the jurisdiction of the District Courts of the United States.

The jurisdiction of the Federal Courts, as defined by the above section of the Code, is as follows:

"The district courts shall have original jurisdiction as follows: * * *

"First. Of all suits of a civil nature at common law or in equity * * * where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3000, and * * * is between citizens of different states * * *" (Appellant's Brief, p. 12.)

[fol. 40] The construction placed upon the above-quoted section of the Code by your Honorable Court is as follows:

"Both Constitution and Code require that there must be a 'controversy.' Under the system of supervisory regulation over insurance companies established by the laws of Pennsylvania there cannot be a controversy in the State courts between a stockholder and an insurance company regarding the liquidation thereof. The power to liquidate insurance companies rests solely in the Insurance Commissioner. A citizen of Pennsylvania cannot, by bringing a bill in equity in a Pennsylvania court against a Pennsylvania insurance company, prevent the Insurance Commissioner from liquidating. If the District Courts of the United States have jurisdiction in cases such as the pending one, a citizen of another state would have rights superior to those of a citizen of Pennsylvania." (See page 5 of the Opinion, submitted herewith as Exhibit "A".)

We submit that this construction is erroneous for the reason that the provision of the Code above-quoted confers jurisdiction upon the District Courts "of all suits of a civil nature at common law or in equity".

As was pointed out in the appellant's brief, (p. 12):

"The proceeding in the Federal Court with which we are concerned is a suit of a civil nature. It has been brought in equity and there is a compliance with the statutory requirements as to the amount involved and diversity of citizenship."

As we understand the decision of your Honorable Court in this case, it is held that the United States District Court does not have jurisdiction as the suit in the Dauphin County Court is not a "controversy" within the meaning of the Constitution and the Code, for the reason that no citizen of Pennsylvania could bring an action to liquidate a Penn-

sylvania insurance company. We have found no case which so limits the jurisdiction of the District Courts. The Code in terms does not qualify the type of suit which may be brought, other than that it shall be of a civil nature.

[fol. 41] We submit that the proceeding taken at the instance of the Attorney General in this matter was a "suit of a civil nature". The filing of the rule to show cause by the Attorney General was the commencement of the suit, as is pointed out in the case of O'Neil v. Welch, 245 Fed. 261, which is quoted on pages 8 and 9 of the Opinion of your Honorable Court (Exhibit "A" hereto).

Further, we respectfully submit that your Honorable Court fell into error in stating that "there cannot be a controversy in the State Courts between a stockholder and an insurance company regarding the liquidation thereof". We find no provision in the Insurance Department Act of 1921 and the Insurance Law of 1921 which specifically states that the Insurance Commissioner shall be the sole person who may move for the liquidation of an insurance company, nor do we find any provision to the effect that a stockholder may not move for the appointment of a Receiver for such purpose.

We submit, as argued in appellant's brief on pages 7, 8, and 9, that an insurance company may be liquidated in a suit instituted in the Courts of the Commonwealth at the instance of a private litigant. This conclusion is supported by the Act of May 17, 1921, P. L. 789 (40 P. S., Sections 207, 208) which provide that Receivers otherwise theretofore appointed may be superseded by the intervention of the Attorney General, and if no intervention occurs, there is nothing that we find in the Act which prevents such Receivership being prosecuted to final conclusion. We do not agree, therefore, with the following statement on page 5 of the Opinion of your Honorable Court:

"If the District Courts of the United States have jurisdiction in cases such as the pending one, a citizen of another state would have rights superior to those of a citizen of Pennsylvania."

We submit, therefore, that the interpretation placed upon [fol. 42] the Judicial Code by your Honorable Court is contrary to its explicit terms giving jurisdiction to the United

States District Courts "of all suits of a civil nature at common law or in equity".

II. If your Honorable Court relies upon the Federal cases cited in support of its interpretation, we desire to point out that in our opinion they are not decisive of the question under consideration.

In Port Newark National Bank of Waldron, 53 Fed. (2d) 296, the point under consideration was not a conflict of jurisdiction of two different sets of Courts, but, as we see it, rather a question of distribution of Federal power.

In Lyon v. McKeefrey, 171 Fed. 384, the Federal Court did take jurisdiction and appoint Receivers, and permitted its Receivership to continue to the point of a distribution of the balance on hand to stockholders after all of its other business had been wound up and terminated, even though prior to the end of the Federal Receivership the corporation had been dissolved by order of the State Court.

In Mitchell v. Lay, 48 Fed. (2d) 79, the question involved was whether a Federal Court could take assets deposited by a foreign insurance company which were in effect a qualifying bond for a foreign insurance company to do business in the State of California. The question there involved was whether the Federal Court could direct the Insurance Commissioner to apply such funds contrary to the terms of the Statute under which he held the same.

In Bank of Bay Biscayne v. Rankins, 42 Fed. (2d) 209, the Court, as we understand its opinion, decided that the circumstances did not warrant its intervention. It seems to us that the Court impliedly recognized the fact that it [fol. 43] had jurisdiction which it could exercise if it saw fit so to do.

In O'Neil v. Welch, 245 Fed. 261, the Court specifically held:

"It cannot be doubted that the Federal Court, in the exercise of its general equity jurisdiction, has power to appoint a Receiver on a stockholder's bill, determine the corporation's solvency, and distribute its assets, and that no State statute can impair or destroy that power."

As we understand that decision, the Federal Court refused to take jurisdiction only for the reason that the Attorney General filed his Suggestion in the State Court prior to the filing of the Bill in the Federal Court.

On the question of priority jurisdiction, we again respectfully refer your Honorable Court to Mitchell v. Maurer and International Re-Insurance Corporation, 69 F. (2d) 233.

By reason of the foregoing matters, we respectfully request that your Honorable Court grant a re-argument of this case.

Respectfully submitted, Rawle & Henderson, by Joseph W. Henderson, Thomas F. Mount.

[fol. 44] [Endorsement:] In the Supreme Court of Pennsylvania, Middle District. No. 28, May Term, 1934. Commonwealth of Pennsylvania ex rel. William A. Schnader, Attorney General, vs. Penn General Casualty Company, Appellant. Motion for Re-Argument. Rawle & Henderson, Packard Building, Philadelphia. Filed in Supreme Court, Jul. 10, 1934, Middle District.

[fol. 45] COMMONWEALTH OF PENNSYLVANIA,
County of Dauphin, Sct:

I, Homer Hummel Strickler, Deputy Prothonotary of the Supreme Court of Pennsylvania, in and for the Middle District thereof, the said Court being a Court of Record, do hereby certify that the foregoing is a true and correct Copy of the whole and entire printed record and other papers before the Supreme Court, as per Request of Counsel in the case of Commonwealth of Pennsylvania ex rel. William A. Schnader, Attorney General, vs. Penn General Casualty Company, Appellant, at No. 28, of May Term, 1934, as full, entire and complete as the same remains on file in the said Supreme Court, in the case there stated; and I do hereby further certify that the foregoing has been compared by me with the original record in said cause in my keeping and custody as the Prothonotary of said Court, and that the foregoing is a correct transcript from said record, and of the whole of the original thereof, as requested by Counsel.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of the said Court at Harrisburg, in the County of Dauphin, in the said Middle District of Pennsyl-

vania, this 15th day of August in the year of our Lord One Thousand Nine Hundred and Thirty-four.

Homer Hummel Strickler, Deputy Prothonotary.
(Seal of the Supreme Court of Pennsylvania, Middle District.)

[Endorsed:] No. 28, May Term, 1934. Commonwealth of Pennsylvania ex rel. William A. Schnader, Attorney General, vs. Penn General Casualty Company, Appellant. Certificate.

[fol. 46] IN THE SUPREME COURT OF PENNSYLVANIA IN AND FOR THE MIDDLE DISTRICT, MAY TERM, 1934

No. 28

COMMONWEALTH OF PENNSYLVANIA ex Rel. William A. Schnader, Attorney General,

vs.

PENN GENERAL CASUALTY COMPANY, Appellant

Appeal from the Court of Common Pleas for the County of Dauphin, No. 343, Commonwealth Docket, 1933

ADDITIONAL DOCKET ENTRIES

* * * * * * *

Jul. 10, 1934.—Motion for re-argument filed.

Sep. 10, 1934.—Re-argument refused. Per Curiam.

Sep. 11, 1934.—Petition for stay of enforcement of decree filed.

Sep. 11, 1934.—Acceptance of service thereof filed.

Sep. 11, 1934.—Answer filed.

Sep. 11, 1934.—Petition to have record retained by Prothonotary filed.

True copy from the record.

In Testimony Whereof, I have hereunto set my hand and the seal of said Court, at Harrisburg this 12th day of September, A. D. 1934.

Homer Hummel Strickler, Deputy Prothonotary.
(Seal of the Supreme Court of Pennsylvania, Middle District.)

[Endorsed:] No. 28, May Term, 1934. Supreme Court. Com. of Pa. ex rel., etc., vs. Penn General Casualty Co., Appellant. Additional Docket Entries.

[fol. 41] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 22, 1934

The petition herein for a writ of certiorari to the Supreme Court of the State of Pennsylvania is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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FILE COPY

SEP 29 1934

IN THE

Supreme Court of the United States

OCTOBER TERM, 1934.

No. 431

PENN GENERAL CASUALTY COMPANY,
Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA, EX REL.,
WM. A. SCHNADER, ATTORNEY GENERAL,
Respondent.

PETITION OF PENN GENERAL CASUALTY COMPANY FOR WRIT OF CERTIORARI, AND BRIEF IN SUPPORT THEREOF.

JOSEPH W. HENDERSON,
THOMAS F. MOUNT,
Counsel for Petitioner.

International, 256 Chestnut Street, Philadelphia

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IN THE

Supreme Court of the United States.

PENN GENERAL CASUALTY COMPANY, *Petitioner,* v. COMMONWEALTH OF PENNSYLVANIA, EX REL., WM. A. SCHNADER, ATTORNEY GENERAL, *Respondent.*	No. . October Term, 1934.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

The petitioner, Penn General Casualty Company, prays that a writ of certiorari issue to review a final decree of the Supreme Court of Pennsylvania, the highest Court of said State. (R. 26.) Said decision affirmed the final decree of the Court of Common Pleas of Dauphin County (R. 15), vacating the charter of the petitioner and appointing a liquidator to wind up its affairs, and held that the United States District Court for the Eastern District of Pennsylvania did not have jurisdiction to appoint a receiver to liquidate the affairs of the petitioner, notwithstanding the prior pendency therein of a suit in equity praying for such relief brought by a non-resident stockholder of the petitioner.

QUESTIONS PRESENTED.

1. Does a federal court located in the state where an insurance company is incorporated have jurisdiction of a

suit in equity instituted by a non-resident stockholder thereof alleging same to be insolvent and praying for the appointment of a receiver to wind up and liquidate the affairs of such company?

2. Can such jurisdiction be limited or impaired by state statutes which provide a system for the incorporation, regulation and liquidation of insurance companies?

3. Where a federal court has first acquired such jurisdiction and the proceedings therein are still pending, can a state court in a suit subsequently instituted appoint a receiver to wind up and liquidate the affairs of such insurance company?

JURISDICTION.

The final decree of the Supreme Court of Pennsylvania was entered on June 30, 1934. (R. 34.)

The re-argument was refused on September 10, 1934. (R. 39.)

The jurisdiction of this Court is provided by Section 237 (b) of the Judicial Code as amended by the Act of February 13, 1925, c. 229, 43 Stat. 937; [28 U. S. C. A. § 344 (b)].

At the trial it was urged that the state court was without jurisdiction to enter a decree since the United States District Court for the Eastern District of Pennsylvania had already acquired jurisdiction of the liquidation and winding up of the petitioner. (R. 23.) The trial court held the said federal court did not have the jurisdiction which it had assumed. (R. 24.)

On appeal, the Supreme Court of Pennsylvania affirmed the decree of the trial court, holding that Section 24 of the United States Code did not confer upon the federal court the jurisdiction which it had exercised. (R. 34.)

The decision of the Supreme Court of Pennsylvania which involves the construction and application of Section 24 of the United States Code, presents a federal question reviewable by this Court, *Longest v. Langford,* 274 U. S. 499.

Opinions Below.

On March 14, 1934, an opinion was filed by the trial judge, Watson R. Davison. (R. 15.) It has not been reported.

The opinion of the Supreme Court of Pennsylvania was written by Justice Schaffer, Chief Justice Frazer, Justices Simpson, Kephart, Maxey, Drew and Linn, concurring.

It was filed on June 30, 1934, and appears on page 26 of the record. (It is reported in 316 Pa. 1.)

Statutes Involved.

The federal statute involved in this proceeding and referred to in the courts below is set forth in Section 24 of the Judicial Code, as amended by the Act of March 3, 1911, c. 231, [36 Stat. 1091; 28 U. S. C. A. § 41 (1)] and is, as follows:

> "The district courts shall have original jurisdiction as follows:
>
> "First. Of all suits of a civil nature at common law or in equity . . . where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3000, and . . . is between citizens of different states."

Statement of Facts.

This is an action begun by the Attorney General of the Commonwealth of Pennsylvania by the filing of a suggestion in the Court of Common Pleas of Dauphin County,

of said State, wherein he sought to have the petitioner dissolved and its affairs liquidated by the Insurance Commissioner. (R. 8.)

Prior thereto, on November 17, 1933, one Samuel Lando, a resident of Wheeling, West Virginia, and a stockholder of the petitioner, filed a bill in equity against the petitioner, a Pennsylvania corporation, in the United States District Court for the Eastern District of Pennsylvania, praying for the appointment of a receiver of the petitioner. (R. 6.)

On November 22, 1933, said bill and citation were duly served on the petitioner. (R. 6.)

On December 8, 1933, the Attorney General of the Commonwealth of Pennsylvania filed the aforesaid suggestion and rule to show cause why the petitioner should not be dissolved, its charter vacated and its affairs liquidated by the Insurance Commissioner. (R. 8.)

On December 11, 1933, said suggestion and rule to show cause were duly served on the petitioner. (R. 9.)

The averments in support of both said bill and said suggestion were substantially the same, to wit, that the affairs of the petitioner had been mismanaged and some of its assets misappropriated by some of its officers, resulting in its unsafe and unsound condition. (R. 7, 8.) Answers were filed by the petitioner to both said bill and said suggestion, admitting various acts of mismanagement and misappropriation, but denying insolvency and the unsafe and unsound condition of the petitioner. (R. 9, 12.) Said answer to the suggestion further averred the pendency of the bill in equity against the petitioner in the federal court. (R. 12.)

On December 14, 1933, the said Common Pleas Court issued a restraining order on the petitioner, restraining it

from further conduct of business and from disposing of or in any way dealing with its property and assets. (R. 9.)

On December 15, 1933, a restraining order was issued by the said District Court restraining the petitioner and its officers from disposing of its assets, otherwise than in the usual course of business. (R. 11.)

On March 14, 1934, after a hearing, the said Court of Common Pleas entered its final decree to the effect that the petitioner was in an unsafe and unsound condition. By the terms of said decree the charter of the petitioner was vacated, and the Insurance Commissioner was appointed liquidator to liquidate its affairs. (R. 12.)

From said decree, an appeal was taken to the Supreme Court of Pennsylvania, in which appeal the petitioner assigned as error the entry of said decree after the federal court had first acquired jurisdiction of the liquidation and winding up of the petitioner. (R. 25.)

On June 30, 1934, the Supreme Court of Pennsylvania rendered and filed its decision affirming the decree of the court below and holding that the said district court, as a court of equity, did not have jurisdiction of a suit brought by a non-resident stockholder against an insurance corporation incorporated under the laws of Pennsylvania for the appointment of receivers to wind up and liquidate the affairs of said corporation. (R. 26, 34.)

REASONS FOR GRANTING THE PETITION.

The petition should be granted because the Supreme Court of Pennsylvania in deciding that the federal court had no jurisdiction of the suit brought by Lando against the petitioner, has misconstrued Article III, Section 2 of the Constitution of the United States and Section 24 of

the Judicial Code as amended by the Act of March 3, 1911, c. 231; [36 Stat. 1091; 28 U. S. C. A. § 41 (1)].

The federal cases relied upon by the Supreme Court of Pennsylvania in support of its decision are not in point.

The decision below is in conflict with the recent case of *Mitchell, Ins. Com. v. Maurer and International Re-insurance Corporation,* 69 F. (2d) 233 (C. C. A. 9th, February 26, 1934).

The decision below is in direct conflict with the recent case of *Com. of Pennsylvania v. Williams, et al.* (C. C. A. 3d, July 24, 1934, not yet reported. See Appendix.)

The said decision of the Supreme Court of Pennsylvania probably conflicts with the general principles concerning the jurisdiction of state and federal courts as set forth by this Court in *Palmer v. Texas,* 212 U. S. 118 (1909), *Chicot County v. Sherwood,* 148 U. S. 529 (1893), and *Harkin v. Brundage,* 276 U. S. 36 (1928).

The questions presented for decision are of national importance and have not heretofore been decided by this Court.

Many states have passed statutes providing for the incorporation, supervision and liquidation of insurance and other companies, and it is of utmost importance to officials of such states, as well as to numberless policy holders, creditors and shareholders of such companies, that this Court decide whether the jurisdiction of the federal courts and the state courts to liquidate such corporations is exclusive or concurrent.

Unless the questions here presented are decided by this Court there is likely to be constant conflict in the future between the federal and state courts, with attendant hardship on numberless policy holders and creditors, such

as has been experienced in the instant case, wherein the orderly liquidation of the affairs of the petitioner has been delayed for many months.

Respectfully submitted,

PENN GENERAL CASUALTY COMPANY

By JOSEPH W. HENDERSON,
Counsel of Record.

STATE OF PENNSYLVANIA,
COUNTY OF PHILADELPHIA, } *ss.:*

JOSEPH W. HENDERSON, being duly sworn, says:

That he is one of the counsel of the petitioner herein and that the foregoing petition is true to the best of his knowledge, information and belief.

JOSEPH W. HENDERSON.

Sworn to before me this twenty-sixth day of September, 1934.

GEORGE M. BRODHEAD, JR.,
(Seal) *Notary Public.*
My commission expires January 19, 1935.

I hereby certify that I have examined the foregoing petition, that in my opinion it is well founded and entitled to the favorable consideration of the Court and that it is not filed for the purpose of delay.

JOSEPH W. HENDERSON.

IN THE

SUPREME COURT OF THE UNITED STATES.

PENN GENERAL CASUALTY COMPANY,
Petitioner,
v.
COMMONWEALTH OF PENNSYLVANIA, EX REL., WM. A. SCHNADER, ATTORNEY GENERAL,
Respondent.

No. .

October Term, 1934.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

For Opinions Below, Jurisdiction, Statement of Case, and Questions Involved, see pages 1 to 7 of the Petition.

ARGUMENT.

FIRST POINT.

THE FEDERAL COURT HAS JURISDICTION OF A SUIT BROUGHT BY A NON-RESIDENT STOCKHOLDER AGAINST AN INSURANCE CORPORATION FOR THE APPOINTMENT OF A RECEIVER TO WIND UP AND LIQUIDATE THE AFFAIRS OF SUCH CORPORATION.

The jurisdiction of the federal court is derived from Article III, Section 2 of the Constitution, and from Section 24 of the Judicial Code, 28 U. S. C. A. § 41 (1).

Under its general equity jurisdiction the federal court, sitting in equity, has the power to appoint a receiver, determine a corporation's solvency and distribute its assets. *Leadville Coal Co. v. McCreery,* 141 U. S. 475 (1891); *O'Neil v. Welch,* 245 Fed. 261 (C. C. A. 3rd 1917); *Morrill et al. v. American Reserve Bond Co.,* 151 Fed. 305 (C. C. Mo. 1907).

State courts, unless restricted by their constitutions or state statutes, have a similar jurisdiction. *U. S. Trust Company v. U. S. Fire Insurance Company,* 18 N. Y. 199, 210 (1858); *Blum Bros. v. Girard National Bank,* 248 Pa. 148, 155 (1915); *Miner v. Belle Isle Ice Co.,* 93 Mich. 97 (1892); *Metropolitan Fire Ins. Co. v. Middendorf,* 171 Ky. 771 (1916); *O'Connor v. Knoxville Hotel Co.,* 93 Tenn. 708 (1894); *Phinizy v. Anniston City Land Co.,* 195 Ala. 656 (1916).

The equity jurisdiction of the federal courts is not limited to a particular class of corporations, but applies to corporations such as insurance companies, banks, and building and loan associations, even though state legislatures have seen fit to provide complete systems for incorporation, supervision, and liquidation of the same. *Commonwealth of Pennsylvania v. John H. Williams et al., Receivers of Mortgage Building and Loan Association* (Decided July 24, 1934. C. C. A. 3rd 1934. Not yet reported. See Appendix to this brief); *Mitchell, Ins. Co. v. Maurer and International Re-Insurance Corporation,* 69 F. (2d) 233 (C. C. A. 9th 1934); *Welch v. O'Neil, supra.*

The Circuit Court of Appeals for the Third Circuit affirmed the decree of the court below in the case of *Com. of Pennsylvania v. Williams, et al., supra,* which entered a decree appointing receivers to liquidate a building and loan association at the suit of a non-resident stockholder.

In *Mitchell, Ins. Com. v. Maurer, et al., supra,* the federal court appointed ancillary receivers at the suit of a non-resident plaintiff to liquidate the property of an insolvent foreign insurance company within its district.

In *Welch v. O'Neill, supra,* the Circuit Court of Appeals for the Third Circuit reversed the court below which had appointed receivers for a domestic insurance company,

not because it did not have jurisdiction to liquidate and wind up an unsound insurance company, (all parties in interest as well as the Court apparently concluding that the federal court did have such jurisdiction) but because similar proceedings had first been instituted in the state court.

Section 24 of the judicial code conferring upon federal courts jurisdiction over controversies between citizens of different states, does not except in terms or by implication controversies which involve the liquidation and winding up of so-called quasi public corporations such as railroads, banks, building and loan associations and insurance companies. That certain of such corporations have been specifically excepted from the bankruptcy act indicates that Congress never intended to otherwise limit the *equity* jurisdiction of federal courts over such corporations.

The cases cited by the Supreme Court of Pennsylvania (R. 30), as holding that federal courts have heretofore disclaimed jurisdiction in situations similar to the present one are not in point so far as the question under consideration is concerned. For a full analysis and discussion of these cases see *Com. of Pennsylvania v. Williams et al.*, (see Appendix hereto, page 24, *et seq.*).

SECOND POINT.

JURISDICTION OF THE STATE COURT OVER THE LIQUIDATION AND WINDING UP OF INSURANCE COMPANIES IS NOT EXCLUSIVE AND CANNOT AFFECT THE JURISDICTION OF THE FEDERAL COURT.

The laws of Pennsylvania provide a system for the incorporation, supervision and liquidation of insurance companies. The pertinent part of the Acts relating thereto are fully discussed by Mr. Justice Schaffer of the Supreme Court of Pennsylvania and, therefore, for present purposes we do not refer to them in detail here (R. 28, 29).

The statutes of Pennsylvania do not provide that the method created thereby for the liquidation of insurance companies shall be exclusive, and it is conceded by the Supreme Court that even if such were the case, "if the Federal Court has jurisdiction, its cognizance of the actions could not be ousted by a State statute declaring that its courts have exclusive jurisdiction" (R. 28).

The effect of the decision of the Supreme Court of Pennsylvania is that the equity jurisdiction of federal courts based on diversity of citizenship is limited so as not to extend to so-called quasi-public corporations by reason of the fact that they are incorporated and regulated by a system of state statutes.

This is tantamount to saying that a state may by its statutes limit the jurisdiction of federal courts.

"The jurisdiction of the courts of the United States over controversies between citizens of different states cannot be impaired by the laws of the States." *Chicot County v. Sherwood,* 148 U. S. 529, 534 (1893). See *Farrell v. Stoddard,* 1 F. (2d) 802, 804 (N. D. N. Y. 1924) where it was held that a *state insurance law* could not deprive a citizen of *another state* of his right to have his case tried in a federal court.

THIRD POINT.

THE JURISDICTION OF THE FEDERAL AND STATE COURTS BEING CONCURRENT, THE FEDERAL COURT, HAVING FIRST ACQUIRED JURISDICTION, IS ENTITLED TO RETAIN IT TO THE EXCLUSION OF THE STATE COURT.

(a) *The proceedings in the state court and in the federal court involved the same issues with regard to the same subject matter.*

The Statement of Case (R. 6, 8) shows that, although the plaintiffs in each of the two proceedings are different

parties, one of which proceeded by a bill in equity and the other by a suggestion, the allegations in support of their respective suits are substantially the same and the relief sought by each is the same, i. e., the winding up of the affairs of the petitioner and the liquidation of its assets (R. 13).

(b) *The federal court first acquired jurisdiction.*

The federal court acquired jurisdiction of the subject matter in controversy on November 17, 1933, when Samuel Lando filed his bill in equity (R. 6). Not until December 8, 1933, twenty-one days thereafter, did the Attorney General file his suggestion in the state court (R. 8).

Prior to the filing of the bill in equity, two hearings and several informal conferences had been held by the Insurance Commissioner and the Attorney General, with a view to a possible rehabilitation of the petitioner (R. 6). Such acts, however, did not confer jurisdiction upon the state court whose aid was not invoked until the said suggestion had in fact been filed. *Commonwealth of Pennsylvania v. Williams et al., supra.* Nor did the issuance of a restraining order or the proceeding to a final decree confer a prior jurisdiction on the state court, *Mitchell, Ins. Com. v. Maurer, et al., supra; O'Neil v. Welch, supra.*

(c) *The federal court, therefore, is entitled to retain its jurisdiction to the exclusion of the state court.*

In *Palmer v. Texas.* 212 U. S. 118 (1908), this Court held that a state court, having first obtained jurisdiction of an oil company for the purpose of liquidating the same, was entitled to retain said jurisdiction to the exclusion of the local federal court in which a bill in equity had subsequently been filed for the same purpose.

As stated in *Harkin v. Brundage,* 276 U. S. 36, 43 (1928)—

"As between two courts of concurrent and coordinate jurisdiction, *the court which first obtains jurisdiction and constructive possession of property by filing of bill is entitled to retain it without interference* and cannot be deprived of its right to do so because it may not have obtained prior physical possession by its receiver of the property in dispute . . ." (Italics ours.)

See also *Com. of Pennsylvania v. Williams et al., supra; Mitchell, Ins. Com. v. Maurer, et al., supra; O'Neil v. Welch, supra.*

CONCLUSION.

We, therefore, submit that the Supreme Court of Pennsylvania has decided a federal question of substance, not specifically heretofore determined by this Court, in a way not in accord with the decisions of this Court applicable to said question, and that the petitioner's prayer for a writ of certiorari should be granted.

Respectfully submitted,

JOSEPH W. HENDERSON,
THOMAS F. MOUNT,
Attorneys for Petitioner.

Philadelphia, Pa.,
September 26, 1934.

Appendix.

IN THE
UNITED STATES CIRCUIT COURT OF APPEALS,
FOR THE THIRD CIRCUIT.

No. 5238. October Term, 1933.

COMMONWEALTH OF PENNSYLVANIA,
Intervenor-Appellant,

v.

JOHN G. WILLIAMS, JOSEPH B. SIMON AND CHARLES DENBY, JR., RECEIVERS OF MORTGAGE BUILDING AND LOAN ASSOCIATION,
Defendants-Appellees.

APPEAL FROM THE DISTRICT OF THE UNITED STATES, FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

OPINION.

(Filed July 24, 1934.)

Before BUFFINGTON, DAVIS and THOMPSON, *Circuit Judges.*

DAVIS, *Circuit Judge.*

This is an appeal from an order of the District Court dismissing the petition of the Commonwealth of Pennsylvania, wherein it prayed the court to direct the receivers, appointed by it, of the Mortgage Building and Loan Association, hereinafter called the Association, to deliver over

to the Secretary of Banking of Pennsylvania all the assets and records of the Association held by them.

This was a stockholder's bill filed against the Association for the appointment of receivers by Edward B. Elson, a resident of the State of New York, who owned stock in the Association, to the amount of $31,000. The bill alleged that the Association was then, and for a long time had been, insolvent and that the real, actual and fair value of its assets was far less than its liability to stockholders on dues paid in, together with its general indebtedness; that the Association had stopped making loans or collecting dues and that "unless its affairs should be liquidated and its assets distributed under the equitable and impartial supervision of a court of competent jurisdiction", immediate and irreparable damage would be suffered. It, therefore, prayed for the appointment of receivers.

The Association filed an answer in which it admitted its insolvency and joined in the prayer of the plaintiff for the appointment of receivers. They were appointed and took over the assets of the Association. The Commonwealth of Pennsylvania intervened and filed a petition and, as above stated, prayed that the assets of the Association be delivered to the Secretary of Banking of Pennsylvania. The court denied the prayer and entered an order dismissing the petition. From this order, the Commonwealth appealed.

Two questions arise: 1. Did the District Court have jurisdiction and consequent power to appoint receivers? 2. If it had, did it abuse its discretion in appointing them?

The District Court derives its power from the Constitution and from Congress and not from the Commonwealth. Article III, Section 2 of the Constitution provides that: "The Judicial power shall extend . . . to controver-

sies . . . between citizens of different states". Congress, pursuant to this authority, has provided that District Courts shall have original jurisdiction of all suits of a civil nature at common law or in equity, where the matter in controversy exceeds, exclusive of costs and interest, the sum or value of $3,000 and is between citizens of different states. Section 24, Judicial Code. This is the source of the jurisdiction and power of the District Court in this case.

While sitting in a state as a court of the United States, the federal court accepts and gives effect to the laws of the state, so far as they do not affect its jurisdiction and the rights of non-resident creditors. Yet it exercises powers independent of the state. A state cannot take away the plenary power of the federal courts given to them by Congress, by conferring exclusive jurisdiction of such controversy upon its own courts and administrative bodies, by prescribing exclusive methods of commencing or conducting litigation, by prohibiting the seizure of the subject of the litigation during its pendency, or by any other means. Natonal Surety Co., v. State Bank, 120 Fed. 593, 602; Morrill et al. v. American Reserve Bond Co. 151 Fed. 305, 313; O'Neil v. Welch, 245 Fed. 261, 265; Leadville Coal Co. v. McCreery, 141 U. S. 475, 477.

In the case of National Surety Co. v. State Bank, supra, Judge Sanborn, speaking for the Circuit Court of Appeals for the Eighth Circuit, said:

> "When the controversy which this bill discloses arose between these citizens of different states, and was presented to the Circuit Court of the United States, that court had jurisdiction to hear and determine it, and the appellants had the legal right to the opinion and the judgment of that court upon the questions which it presented. This right and this jurisdiction

were not conditioned by the fact that the complainants *had or had not like rights or remedies in the state courts,* or by the fact that those courts had or had not concurrent jurisdiction. Indeed, this right and this jurisdiction were provided by the Constitution, and granted by the acts of Congress, for the express purpose of enabling citizens of different states to escape from an adjudication of their rights by state courts which had concurrent jurisdiction to grant the relief and to administer the remedies which they were seeking in the national courts The rights of these appellants to their hearing and decree in the federal court, and the jurisdiction of that court to determine their controversy, were independent of state legislation. The state of Nebraska did not grant, and it could not revoke or impair, that right or that jurisdiction"

In the Morrill case, supra, Judge Sanborn further said:

"A federal court sitting in equity has the plenary jurisdiction of the English Court of Chancery, and one of the inherent powers of each court is to take and to hold by its own hands, by its receivers, the control and the possession of mortgaged, pledged, and trust property during the pendency of suits concerning it in those courts whenever in the exercise of a wise judicial discretion these courts are of the opinion that the most speedy and perfect administration of justice and the rights of the parties interested in the property will be best secured by such action. The statutes of the state of Missouri do not by their terms, and the Legislature of that state never, intended that they should in any way limit or impair this power of the federal courts Moreover, the power of the Circuit Courts of the United States to adjudicate claims and administer remedies in equity is vested in them as a part of the judicial power of the nation by the Constitution of the United States and the judiciary act of 1789, and, as it

> was not granted by, it may not be revoked, impaired, or limited by, the act of any state. Wherever citizens of different states lawfully invoke the jurisdiction of the federal courts to determine controversies between them which involve the requisite amounts, they have the constitutional right to the conduct of that litigation by the methods, to the administration of the remedies, and to the determination of those controversies by the independent judgments of those courts; and no state, by conferring exclusive jurisdiction of such issues upon its own courts, by prescribing exclusive methods of commencing or of conducting litigation, by prohibiting the seizure of the subject of the litigation during its pendency, or by any other means, may lawfully strike down that right or take away the plenary power of the national courts to conduct the litigation, to administer their remedies, and in the exercise of their judicial discretion to control the possession of its subject-matter during its pendency in accordance with their established rules of practice, and finally to adjudicate the claims of the parties and to enforce their judgments"

In the case of O'Neil v. Welch, supra, Judge Woolley, speaking for this court said:

> "It cannot be doubted that the Federal Court, in the exercise of its general equity jurisdiction, has power to appoint a receiver on a stockholder's bill, determine a corporation's solvency and distribute its assets, and that no State statute can impair or destroy that power."

In that case the District Court in Pennsylvania had appointed a receiver for an insurance company, for the supervision and liquidation of which the Commonwealth had provided the same general complete system that it has for building and loan associations Judge Woolley further said:

"While the two courts have concurrent jurisdiction in the sense that each has the same jurisdiction, it is a policy of the law that the jurisdiction of both shall not be concurrently invoked and exercised; hence it is a well settled rule that as between two courts having concurrent jurisdiction of the subject of an action, the court which shall first obtain jurisdiction has the right to proceed to its final determination without interference from the other."

In Leadville Coal Co. v. McCreery, supra, the Supreme Court said:

"The Circuit Court takes its jurisdiction not from the State of Ohio, but from the United States; and the extent of its jurisdiction is not determined by the laws of the State, but by those of the United States. Doubtless, while sitting in the State as a court of the United States, it accepts and gives effect to the laws of the State so far as they do not affect its jurisdiction and the rights of non-resident creditors. It nevertheless exercises powers independent of the laws of the State; and when, in pursuance of the jurisdiction conferred by the laws of the United States, it takes possession of the property of a defendant and proceeds to final decree, determining the rights of all parties to that property, its decree is not superseded and its jurisdiction ended by reason of subsequent proceedings in the courts of the State, looking to an administration of that property in accordance with the laws of the State. It would be an anomaly in legal proceedings if, after a court with full jurisdiction over property in its possession has finally determined all rights to that property, subsequent proceedings in a court of another jurisdiction could annul such decree, and disturb all rights once definitely determined. No such anomaly exists in the relative jurisdiction of state and Federal courts. The latter having once acquired full jurisdiction, and proceeded to a final determination, may right-

fully proceed still further and to an execution of that decree, irrespective of any proceedings in the courts of the State."

These cases are declaratory of the law generally, but they do not deal specifically with controversies arising over quasi public corporations. The Commonwealth of Pennsylvania, in the exercise of its public policy has provided for her quasi public corporations, including building and loan associations, a complete system for incorporation, supervision and liquidation.

The question is as to whether or not the well settled rule of law applies when a controversy involving a quasi public corporation, such as a building and loan association, arises between citizens of different states. The question comes to this: Is the jurisdiction of the federal court, conferred by federal statutes in accordance with the power granted to Congress by the Constitution, ousted by the public policy of the Commonwealth?

Nowhere has there been any enactment by Congress excepting controversies between citizens of different states involving the liquidation of quasi public corporations from the clear and comprehensive language conferring jurisdiction upon federal courts sitting in equity. But municipal, railroad, insurance and banking corporations have for years been taking away from the jurisdiction of federal courts sitting in bankruptcy, and in 1932, building and loan associations were added to that list. The fact that Congress expressly removed certain quasi public corporations from the jurisdiction of federal courts sitting in bankruptcy, while it did not remove them from the jurisdiction of federal courts sitting in equity, would indicate that it did not intend to do so, and this inference is rendered more plausible and

strengthened when it is recalled that those courts have, in proper cases, for a long time been assuming jurisdiction over and liquidating building and loan associations.

In discussing this subject in his opinion in the court below, Judge Welsh said:

> "Finally upon this point it may be said that it is no unusual thing for federal courts to appoint Receivers for building and loan associations, and wherever challenged the jurisdiction of the federal court when first invoked seems to have been upheld. See the following cases, all of which are building and loan association cases:
>
> Towle v. American Bldg. & Loan Assn., 60 Fed. 131 (Ill.).
>
> Sleeper v. Winkle, 122 Fed. 736 (C. C. E. D. Pa.).
>
> American B. & L. Investment Co., (appointed on stockholder's bill), Towle v. American Building, Loan & Investment Company (supra).
>
> Cumberland B. & L. Assn. (on stockholder's bill). Wilson v. Parvin, 119 Fed. 652 (C. C. A. 6).
>
> Interstate B. & L. Assn. (on stockholder's bill—primary receiver appointed in C. D., N. D., Ga. 1900). Flynn v. Interstate B. & L. Assn., 141 Fed. 672 (C. C., S. C.).
>
> Universal Savings & Trust Co. (On stockholder's bill). Universal Savings & Trust Co. v. Stoneburner, 113 Fed. 251 (C. C. A. 4.).
>
> Bluegrass B. & L. Assn. (appointed pendente lite on stockholder's bill). Powers v. Bluegrass, 86 Fed. 705 (C. C., Ky.).

Douglass v. Kavanaugh, 90 Fed. 373 (C. C. A. 6).

Columbia Mutual Building Assn. (Receivers actually appointed in Federal Court in March 1902.) Miers v. Columbia Mutual Building Assn., 157 Fed. 940 (S. D. of N. Y.).

Baltimore B. & L. Assn. of Baltimore City, (Primary receiver had been appointed by this court 1900). Coltrane v. Baltimore B. & L. Assn. of Baltimore City, 110 Fed. 272 (C. C., Md.).

National Home B. & L. Assn. (Primary receiver appointed in Southern District of Ill.) McMurray v. Gosney, ancillary receiver in W. D. of Pa., 106 Fed. 11 (C. C., W. D., Pa.).

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Fidelity Trust & Loan Company (Receiver had not been appointed). Manorita v. Fidelity Trust & Loan Co., 101 Fed. 8, (C. C., S. D. Ala.).

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Southern B. & L. Assn. (Primary receiver in N. D. Ala.). Cooper v. Newton, 160 Fed. 190 (C. C., Ga.).

American B. & L. Assn. (Receiver had been appointed). Solomons v. American B. & L. Assn., 116 Fed. 676 (C. C., N. D., Ga.).

Our attention has been called to the learned opinion, filed June 30, 1934, of Mr. Justice Schaffer of the Supreme Court of Pennsylvania, in which that court, for whose members personally and professionally we have the highest regard, reached the conclusion that a federal court is without jurisdiction in cases involving the liquidation of quasi public corporations because it would infringe upon the public policy of the Commonwealth which has provided a complete system wherein the liquidation has been restricted to her own courts and administrative officers. This conclusion is based not only upon the public policy of the Commonwealth, but also upon the court's interpretation of certain federal court decisions. Mr. Justice Schaffer said: "As we read the decisions of the Federal Appellate Courts, jurisdiction in situations similar to the present one has been disclaimed by those tribunals."

The following cases are cited and quoted in support of the above statement: Port Newark National Bank v. Waldron, 46 Fed. (2d) 296, 299; O'Neil v. Welch, 245 Fed. 261, 267; Lyon v. M'Keefrey, 171 Fed. 384, 393; Mitchell v. Lay, 48 Fed. (2d) 99; Lee v. Edmunds, 66 Fed. (2d) 122, 125; Bank of Bay Biscayne et al. v. Hankins, et al., 42 Fed. (2d) 209; Shapiro v. Wilgus, 287 U. S. 348. If those cases do disclaim jurisdiction over the issue here involved, that would settle the issue. In order to determine whether or not they do, it is necessary to analyze and discuss them.

From the Port Newark National Bank case, the following is quoted:

". . . in the present case we regard the Comptroller at the time this bill was filed as having complete

dominion over, and by his bank examiner, full legal control of, the then and future operations of the bank, and that such situation might ultimately require the appointment of a receiver. Consequently, the court below, when the bill was filed, acquired no jurisdiction to shear the Comptroller of the Statutory power to take the further step of appointing a receiver in case insolvency existed and the attempted sale fell through."

This case really has no bearing upon the question to be decided here or which was decided by the Supreme Court of Pennsylvania. This court held in this case that the Comptroller was in possession of the insolvent bank when the bill was presented to the court for the appointment of a receiver and further that the contest was not between two courts of concurrent and co-ordinate jurisdiction, but between the judicial and executive branches of the same sovereignty, and when that sovereignty had given one branch exclusive control, the other branch could not interfere and thus have "a house divided against itself."

That is not the situation in the case at bar, nor was it the situation in the case in the Supreme Court of Pennsylvania. It is true when the Commonwealth of Pennsylvania provided a complete and exclusive system for the incorporation, supervision and liquidation of her building and loan associations, no state court, which derived its jurisdiction and power from the Commonwealth could appoint a receiver other than the one designated in the act to liquidate insolvent building and loan associations, or proceed by a method different from that provided in the statute. The judicial branch was limited by the exclusive jurisdiction and power which the sovereign Commonwealth had conferred upon its executive branch.

But such is not the situation in the case at bar. This case grows out of a controversy arising between citizens of

different states. United States District Courts are given jurisdiction over such controversies, and state governments cannot impair that jurisdiction. When federal courts first exercise their jurisdiction, they can maintain it to the end of the litigation, to the exclusion of a state court having concurrent jurisdiction. That a citizen of another state may invoke the aid of a federal court sitting in Pennsylvania, and thus possess a right not enjoyed by a citizen of Pennsylvania, as Mr. Justice Schaffer observed, is no argument against the jurisdiction of the federal court in this case. National Surety Co. v. State Bank, supra; Mitchell v. Maurer, 69 Fed. (2d) 233, 241. In the National Surety case, Judge Sanborn said: "This right and this jurisdiction were not conditioned by the fact that the complainants had or had not like rights or remedies in the state courts." It is well settled that any citizen of another state may come into Pennsylvania and bring any suit of a civil nature at common law or in equity against one of her citizens in the federal court which is closed to a citizen of Pennsylvania in the same suit. He must bring suit in the State Court.

Mr. Justice Schaffer further quoted from Judge Woolley in the case of O'Neil v. Welch, as follows:

> "The state engaged in this undertaking primarily for the protection of the public. Being for the public, its action is a governmental function. When in its exercise it becomes necessary to protect the public from insolvent or improperly conducted insurance companies, the state pursues a remedy prescribed by the same law that conferred the corporation's rights and defines the state's duties. Given briefly, the Insurance Commissioner, acting through the Attorney General, files in a State court a suggestion of the corporation's insolvency or unlawful conduct. In this way the State acts and in this way the State begins suit. Upon the

State's suggestion the court starts a judicial inquiry by directing to the Insurance Company a rule to show cause why the Insurance Commissioner should not take possession of its property, and at the same time (that is at the very beginning of the suit), the court, if it wishes, lays its hand upon the company's property, and by a restraining order holds it within its control pending the inquiry.

"The jurisdiction of the State Court thus invoked is a special jurisdiction conferred by statute as a part of the State's policy of insurance regulation and control. It is not conferred for the protection of corporation's policyholders and creditors alone, but for the protection of the public as well. This clearly appears by the terms of the act; it again appears in the court's decree. In prosecuting an insurance company the State is acting for the public, and the public is in turn interested in the proceeding; though not nominally present as a party, it is nevertheless present in the person of the Attorney General."

But a reading of this opinion will disclose that the question before us was not in issue in that case. On page 264 Judge Woolley said:

"As we view the case, it does not present the questions:—whether a Federal Court has power to decree the dissolution of a corporation of the Commonwealth of Pennsylvania in a proceeding in which its jurisdiction first attached; *whether a Federal court has authority to supersede and take away the general control over insurance companies vested by State statute in the Insurance Commissioner, before the Insurance Commissioner has in the exercise of his control begun proceedings in a State court.* . . . All these questions were in some measure considered in the decision and argued on appeal. As we view it, *the case presents the single question: Which court first acquired jurisdic-*

tion? No other question is in issue and no other will be decided?" (Italics ours.)

Consequently if anything was said bearing on the question before us, and we do not think there was, it was obiter dictum and was not decided. Which court first acquired jurisdiction was the only issue decided.

The opinion also quotes from Judge Gray in the case of Lyon v. M'Keefrey, supra, as follows:

> "But the court below has clearly exhausted its jurisdiction, so far as the purposes of the original bill are concerned. That bill did not contemplate a dissolution of the corporation and a winding up of its business, indeed, the court was without jurisdiction for that purpose."

That case involved the receivership of the Iron City Trust Company, a Pennsylvania corporation engaged in the general banking business in the City of Pittsburgh, Pa. Its assets largely exceeded its liabilities, but they could not be converted into cash in time to meet its liabilities as they matured. It was alleged that its failure to meet its obligations would result in vexatious and costly litigation, would subject the assets to attachment and execution, and that they would bring much less than their fair and reasonable value to the great prejudice of the creditors and stockholders unless they were properly protected by the court.

On the day the bill was filed, the Iron City Trust Company filed its answer admitting the allegations of the bill and joined in the prayer for the appointment of receivers "to the end that all creditors be paid in full, without loss and sacrifice of its assets, so as the preserve the same for its stockholders as well."

On that same day receivers were appointed who proceeded to the discharge of their duties and in due course, they paid in full all the creditors and had left in their hands more than $2,500,000 belonging to somebody. When all the creditors were paid, that exhausted the jurisdiction of the District Court as it did not have power to dissolve the corporation and wind up its affairs.

In the meantime, while proceedings were going on in the federal court, the Attorney General of Pennsylvania began proceedings in the court of Common Pleas of Dauphin County in accordance with the statute for the control and regulation of banking companies, had a decree entered dissolving the corporation and had receivers appointed to wind up its affairs.

Mr. Justice Schaffer further quotes from Judge Gray as follows:

> "The defendant corporation was a creature of the laws of Pennsylvania, and by those laws the rules governing its existence were prescribed. The measure of control to be exercised over its own corporations was determinable by the law and policy of the state to which they owed their being. By the legislation here in question, the state of Pennsylvania has seen fit to subject such corporations to supervision and administrative control and has ordained the proceedings, partly administrative and partly judicial, by which the life of such corporations may be determined and their affairs wound up and liquidated. The judicial proceeding is not one that may be instituted by private parties, but by the Attorney General of the state, acting on behalf of the commonwealth and in the interest of the public. Such a proceeding is not one of which a United States court can have concurrent jurisdiction. It does not involve a controversy between private parties,

whether citizens of the same state or of different states."

This refers to the special jurisdiction, partly administrative and partly judicial, to which Pennsylvania has subjected her quasi public corporations, and which can be invoked only by her special agents designated in the statute, but that does not exclude the ordinary jurisdiction of federal courts over controversies arising between citizens of different states. The opinion of Judge Woolley in O'Neil v. Welch, supra, settles that question for this court. Immediately following the above quotation, Judge Gray said:

> "The Supreme Court of Pennsylvania has decided as we have seen, that such proceeding does not exclude the jurisdiction of the courts, state or federal, as regards the ordinary litigation in which the corporation as a party may be involved, growing out of controversies of a private and civil nature."

That the District Court had jurisdiction was expressly admitted by counsel representing the receiver in that case. Judge Gray said:

> "No question as to the right of the court below to take jurisdiction of the cause presented to it by the bill and answer filed October 23, 1907, is here raised: In their brief the counsel for the appellant say:
>
> > 'Our position is that for the purposes of this case we concede the jurisdiction of the circuit court and its receivers to administer this estate up until the time that all creditors had been paid in full and the rights of the complainants in the bill determined, and that the jurisdiction to this extent was not affected nor the proceedings abated by the subsequent dissolution of the corporation by the decree of the state court.' "

Consequently this case has no bearing on the question at issue.

The opinion of the Pennsylvania Court also quotes from the cases of Lee v. Edmunds, 66 Fed. (2d) 122 and Bank of Bay Biscayne et al. v. Hankins, et al., 42 Fed (2d) 209. The following is from the Lee case:

> "The decisions of this court have agreed with those of the Supreme Court of Florida that only in a clear case of mismanagement will a court of equity take the assets from the statutory administration. . . . Yet a court of equity in case of necessity may appoint a receiver for special property in the liquidator's hands, but only on a showing of fraud, corruption, or maladministration or other illegal action of the liquidator."

From the latter case the following is quoted:

> "Regardless of the terms used, it is apparent that the order in effect appoints a receiver to control the assets of the failed bank, and enjoins the comptroller from carrying on the liquidation of the institution under provisions of the laws of Florida. A bank organized under the laws of a state is a quasi public institution, and, whenever the laws of the state provide for supervision and control of the affairs of the bank by an authorized official, and also for the ultimate liquidation and distribution of its assets under his direction, in the event of its insolvency, it is a matter of grave consequence for any court to interfere. (Here follows two sentences omitted from the quotation, 'and that should be done only in a perfectly clear case. It does not appear from the record that such a case is presented here'). The laws of Florida provide an orderly method of liquidating the affairs of an insolvent state bank, in substantially the same manner that federal statutes provide for the liquidation of an in-

solvent national bank. It is usually a matter of discretion to issue an injunction and appoint a receiver, but the exercise of jurisdiction and the entering of the order appealed from in this case appear to us to be unwarranted."

In the first place, in the Lee case, proceedings had been begun in the state court several months before they were started in the federal court and in view of this fact, it is well settled that the federal court had no jurisdiction and could do nothing else than direct the federal receiver to turn over the assets to the state authorities.

In the case of Bank of Bay Biscayne, the Comptroller of the state had closed the bank and was liquidating it when the receiver was appointed by the federal court. Under such circumstances the court said it was "a matter of grave consequence for any court to interfere", and then added the two significant sentences omitted from the quotation in the decision of the Supreme Court of Pennsylvania. These sentences show that in the opinion of the Fifth Circuit court the federal court does have jurisdiction in a clear case.

The Pennsylvania opinion cites the case of Shapiro v. Wilgus, 287 U. S. 348, where the Supreme Court gave warning that the appointment of receivers by federal courts at the suit of a simple contract creditor where the defendant was willing to waive the irregularity and consent to the decree, should not be granted loosely as a weapon of coercion or as a means of frustrating the public policy of a state, but should be invoked in the aid of equity to conserve the common fund for the benefit of the suitor with a legitimate claim and the creditors at large. This bears only on the question of discretion to be exercised by a District Judge.

The opinion of Judge Wilbur of the Circuit Court of Appeals of the Ninth Circuit in the case of Mitchell v. Lay, 48 Fed. (2d) 79, was cited. But that case did not involve the question here in issue, as a mere reading of the opinion will show.

> "It would seem clear that before the plaintiff was justified in coming into a court of equity for the appointment of a receiver and the liquidation of the affairs of the insurance company, she should have exhausted her remedy against this special fund deposited for her benefit. *Whether, upon the ground of diversity of citizenship and in default of any judicial proceeding in the state courts, a federal court of equity might enforce the rights of a nonresident to such fund or take jurisdiction thereof, is a question not involved in this case,* for there is no claim that there has been any default or misconduct on the part of any one with reference to the deposit in question." (Italics ours.)

But Judge Wilbur did sit in a case, overlooked by Mr. Justice Schaffer, Mitchell v. Maurer, 69 Fed. (2d) 233, in which this exact question was present.

The International Re-Insurance Corporation, a Delaware Corporation, became insolvent and on March 23, 1933, a bill for the appointment of receivers was filed in the Court of Chancery of Delaware which appointed three receivers on April 19, 1933.

On the same day at 4:45 P. M. a petition was filed in the federal court in California for the appointment of an ancillary receiver. On the same day, but nine minutes later, a similar petition was filed in the State court of California which issued an order restraining the insurance company from transacting business, etc. In the meantime the Insurance Commissioner of California suspended the right of the insurance company to transact business in California.

After several orders and counter orders had been made by both the state and federal courts, each trying to get exclusive control of the liquidation of the insolvent insurance company, the Insurance Commissioner of California appealed from an order made by the federal court denying his motion to vacate its order appointing receivers and from an order refusing to rehear the motion to vacate.

The State of California has provided a complete system for the liquidation of her own insurance companies. The Insurance Commissioner contended and the appellees admitted that the state statute directed that the liquidation of insolvent insurance companies proceed in the state court only and that the Insurance Commissioner could not have proceeded in the federal district court. Consequently nonresidents had a right, the choice of a federal court in which to proceed, which citizens of California did not have, but the California court treated that argument as without significance because it held that the federal court had concurrent jurisdiction with the state court over controversies involving quasi public corporations and was exercising that jurisdiction over the same subject matter in similar proceedings and for the same end.

In not one of the federal cases cited or quoted in the Pennsylvania decision has the question in the case at bar, the jurisdiction of the federal court on a controversy involving quasi public corporations arising between citizens of different states, been in issue and not a single court in those cases has pronounced upon it.

The appointment of the receivers in this case arose out of a controversy between the plaintiff, a citizen of the State of New York, and the Association, a citizen of the Commonwealth of Pennsylvania. Congress has expressly conferred jurisdiction upon federal courts to appoint re-

ceivers in equity upon a stockholder's bill in such a case and that power cannot be taken away by state legislatures.

Further we have not been referred to a single case, by very industrious and competent counsel, which holds that in a proper case a federal court sitting in equity is without power to appoint a receiver for a building and loan association. The Attorney General, able and brilliant, virtually admits that the District Court did have jurisdiction, but ought not to have exercised it, for he says: "We are urging not that the District Court was technically without jurisdiction, but that it ought not to have exercised its jurisdiction."

If it has power, the appointment under the circumstances was a question of discretion. Having exercised that discretion, the final question before us is whether or not in so doing the District Judge abused his discretion. In order to determine that question, a brief review of the facts is necessary.

On May 7, 1932, the Nice Ball Bearing Company secured a judgment against the Association for $40,000.14 in Common Pleas Court No. 2 of Philadelphia County. This judgment was affirmed by the Supreme Court of Pennsylvania on January 16, 1933.

The Secretary of Banking of the Commonwealth of Pennsylvania made an examination of the affairs of the Association and as a result he caused a hearing to be held before the Attorney General and a duly authorized representative of the Department of Banking, concerning the affairs of the Association "which was then and there found to be in an unsafe and unsound condition". The Secretary thereupon instructed the officers and directors of the Association "to follow a definite course of action to safe-

guard the interests of defendant's creditors and shareholders".

On that same day the Secretary wrote a letter to the president of the Association in which he placed its "activities on a rigidly restricted basis" and directed it to:

1. Accept no more dues on account of shares of stock.
2. Return segregated dues to stockholders immediately.
3. Credit payments by the borrowers on account of the principal of the obligations, after deducting legal interest.
4. Pay withdrawals pro rata to all stockholders after payment of preferred claims."

And finally said:

> "The above instructions to be strictly adhered to until the association is again examined by this Department, which will be sometime after the first of the year."

The Nice Ball Bearing Company threatened to issue execution on its judgment and finally filed a bill in the District Court in which it prayed the court to direct that certain United States Liberty bonds, placed in escrow with the Tradesmens National Bank and Trust Company of Pennsylvania, to secure the surety at the time of the appeal to the Supreme Court of Pennsylvania, be turned over to it, but the court refused and its order was affirmed by this court.

The Association continued to go along and conduct business on this restricted basis while insolvent or in an unsafe and unsound condition from June 5, 1931, until the bill in this case was filed, February 9, 1933, when it was

admittedly insolvent, with the interests of all persons who dealt with it or who were connected with it, in jeopardy.

Under these circumstances, we cannot say that the District Judge abused his discretion in appointing receivers.

The plaintiff, who filed the bill in this case has rights arising under the statutes and Constitution of the United States and had the option of choosing his forum for the enforcement of those rights. Having made that choice, it was the duty of the District Court which first assumed jurisdiction to retain it and determine those rights. It is not a question here of comity which in order to avoid an unseemly conflict requires the court last assuming jurisdiction to yield. There was, however, no question as to which court, the state court or the federal court, first acquired jurisdiction. Being a question of right, it was as much the duty of the District Court to retain jurisdiction and determine the matters before it as it would have been to surrender jurisdiction if the state court had first acquired jurisdiction.

It follows that the decree must be affirmed.

A true Copy:
Teste:

Clerk of the United States Circuit Court of Appeals for the Third Circuit.

FILE COPY

IN THE

Supreme Court of the United States

No. 431. October Term, 1934.

PENN GENERAL CASUALTY COMPANY,
Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA, Ex Rel.,
WM. A. SCHNADER, Attorney General.

On Writ of Certiorari to the Supreme Court of Pennsylvania.

BRIEF FOR PETITIONER.

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IN THE

Supreme Court of the United States.

No. 431. October Term, 1934.

PENN GENERAL CASUALTY COMPANY,
Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA Ex Rel. WM. A. SCHNADER, ATTORNEY GENERAL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

BRIEF FOR PETITIONER.

This case comes before the Court on Writ of Certiorari issued to review a final decree of the Supreme Court of Pennsylvania, the highest Court of said State.

OPINIONS BELOW.

On March 14, 1934, an opinion was filed by the trial judge, Watson R. Davison. (R. 15.) It has not been reported.

The opinion of the Supreme Court of Pennsylvania was written by Justice Schaffer; Chief Justice Frazer, Justices Simpson, Kephart, Maxey, Drew and Linn, concurring.

It was filed on June 30, 1934. (R. 26.) It is reported in 316 Pa. 1.

STATUTES INVOLVED.

The federal statute involved in this proceeding and referred to in the courts below is set forth in Section 24 of the Judicial Code, as amended by the Act of March 3, 1911, c. 231, 36 Stat. 1091 [28 U. S. C. A. § 41 (1)] and is, as follows:

> "The district courts shall have original jurisdiction as follows:
>
> "First. Of all suits of a civil nature at common law or in equity . . . where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3000, and . . . is between citizens of different states."

The statutes of the Commonwealth of Pennsylvania, which are involved in this proceeding and were referred to in the courts below, are set forth in "The Insurance Department Act of 1921," approved May 17, 1921, P. L. 789 (40 P. S. § 1, et seq.) and "The Insurance Company Law of 1921," approved May 17, 1921, P. L. 682 (40 P. S. § 341, et seq.). The material and relevant portions of said Insurance Department Act of 1921 are as follows:

> "Section 502. *Applications to Court to Take Over Business of Companies, Et Cetera, for Protection of Policyholders, Creditors, Et Cetera.*—Whenever any domestic insurance company . . . (a) is insolvent; or . . . (e) is found, after an examination, to be in such condition that its further transaction of business will be hazardous to its policyholders, or to its creditors, or to the public; . . . the Insurance Commissioner shall communicate the facts to the Attorney General, who shall, after hearing, apply to the court of common pleas of Dauphin County . . . for an order directing such company, to show cause why its business should

not be closed, and the Insurance Commissioner should not take possession of its property and conduct its business, and for such other relief as the nature of the case and the interests of its policyholders, creditors, stockholders, or the public may require." (40 P. S. § 202.)

"Section 505. *Injunction; Return of Order to Show Cause and Decrees Thereon.*—On such application, or at any time thereafter, such court may, in its discretion, issue an injunction restraining such company . . . from the transaction of its business or disposition of its property until the further order of the court. . . ." (40 P. S. § 205.)

"Section 506. *Orders for Liquidation of Affairs of Companies, Et Cetera; Insurance Commissioner To Act as Receiver.*—If, on a like application and order to show cause, and after a full hearing, the court shall order the liquidation of the business of such company . . . such liquidation shall be made by and under the direction of the Insurance Commissioner, who shall be vested by operation of law with title to all of the property, contracts, and rights of action of such company . . . as of the date of the order so directing him to liquidate. . . ." (40 P. S. § 206.)

"Section 507. *Insurance Commissioner to Supersede Other Receivers.*—Whenever a receiver of an insurance company . . . is appointed by any court of this Commonwealth, on motion of the Attorney General at the instance of the Insurance Commissioner, such receiver shall forthwith supersede any receiver previously appointed by the decree of any court of this Commonwealth, and shall likewise supersede any assignee or trustee previously appointed by such insurance company. . . ." (40 P. S. § 207.)

"Section 508. *Superseded Receivers, Et Cetera, To Deliver Over Property and File Accounts.*—Such

superseded receiver, assignee, or trustee shall forthwith pay over and deliver all moneys, securities, assets, and property of such insurance company . . . in his or their custody, possession, or control to the receiver appointed as aforesaid on motion of the Attorney General, and shall likewise file his or their account in the court having jurisdiction of such superseded receiver, assignee, or trustee, which court shall allow credit for compensative counsel fees and expenses and for disbursements which shall have been properly earned, incurred, or made, prior to the appointment of the receiver made on motion of the Attorney General as aforesaid." (40 P. S. § 208.)

JURISDICTION.

The final decree of the Supreme Court of Pennsylvania was entered on June 30, 1934. (R. 34.)

The re-argument was refused on September 10, 1934. (R. 39.)

The jurisdiction of this Court is provided by Section 237 (b) of the Judicial Code as amended by the Act of February 13, 1925, c. 229, 43 Stat. 937 [28 U. S. C. A. § 344 (b)].

At the trial it was urged that the state court was without jurisdiction to enter a decree since the United States District Court for the Eastern District of Pennsylvania had already acquired jurisdiction of the liquidation and winding up of the petitioner. (R. 23.) The trial court held the said federal court did not have the jurisdiction which it had assumed. (R. 24.)

On appeal, the Supreme Court of Pennsylvania affirmed the decree of the trial court, holding that Section 24 of the Judicial Code did not confer upon the federal court the jurisdiction which it had exercised. (R. 34.)

The decision of the Supreme Court of Pennsylvania which involves the construction and application of Section 24 of the Judicial Code, presents a federal question reviewable by this Court, *Longest v. Langford,* 274 U. S. 499 (1927).

STATEMENT OF FACTS.

On November 17, 1933, one Samuel Lando, a resident of Wheeling, West Virginia, and a shareholder of the petitioner, filed a bill in equity against the petitioner, a Pennsylvania corporation, in the United States District Court for the Eastern District of Pennsylvania, praying for the appointment of a receiver of the petitioner. (R. 6.)

On November 22, 1933, said bill and citation were duly served on the petitioner. (R. 6.)

On December 8, 1933, the Attorney General of the Commonwealth of Pennsylvania, filed in the Court of Common Pleas of Dauphin County of said state a suggestion and a rule to show cause why the petitioner should not be dissolved, its charter vacated and its affairs liquidated by the Insurance Commissioner. (R. 8.)

On December 11, 1933, said suggestion and rule to show cause were duly served on the petitioner. (R. 9.)

The averments in support of both said bill and said suggestion were substantially the same, to wit, that the affairs of the petitioner had been mismanaged and some of its assets misappropriated by some of its officers, resulting in its unsafe and unsound condition. (R. 7, 8.) Answers were filed by the petitioner to both said bill and said suggestion, admitting various acts of mismanagement and misappropriation, but denying insolvency and the unsafe and unsound condition of the petitioner. (R. 9, 12.) Said answer to the suggestion further averred the pendency

of the aforesaid bill in equity against the petitioner in the federal court. (R. 12.)

On December 14, 1933, the said Court of Common Pleas issued a restraining order on the petitioner, restraining it from further conduct of business and from disposing of or in any way dealing with its property and assets. (R. 9.)

On December 15, 1933, a restraining order was issued by the said District Court restraining the petitioner and its officers from disposing of its assets, otherwise than in the usual course of business. (R. 11.)

On March 14, 1934, after a hearing, the said Court of Common Pleas entered its final decree to the effect that the petitioner was in an unsafe and unsound condition. By the terms of said decree the charter of the petitioner was vacated, and the Insurance Commissioner was appointed liquidator to liquidate its affairs. (R. 12.)

From said decree, an appeal was taken to the Supreme Court of Pennsylvania, in which appeal the petitioner assigned as error the entry of said decree after the federal court had first acquired jurisdiction of the liquidation and winding up of the petitioner. (R. 25.)

On June 30, 1934, the Supreme Court of Pennsylvania rendered and filed its decision affirming the decree of the court below and holding that the said district court, as a court of equity, did not have jurisdiction of a suit brought by a non-resident shareholder against an insurance corporation incorporated under the laws of Pennsylvania for the appointment of receivers to wind up and liquidate the affairs of said corporation. (R. 26, 34.)

SPECIFICATION OF ERRORS.

The Assignment of Error which the petitioner intends to urge is that the Supreme Court of Pennsylvania erred

in affirming the decree of the Court of Common Pleas of Dauphin County by which the charter of the petitioner was vacated and a liquidator was appointed to wind up its affairs. (R. 25, 34.)

QUESTIONS PRESENTED.

1. Does a federal court located in the state where an insurance company is incorporated have jurisdiction of a suit in equity instituted by a non-resident shareholder thereof alleging same to be insolvent and praying for the appointment of a receiver in order to enforce and adjust the rights and equities of the creditors and shareholders?

2. Can such jurisdiction be limited or impaired by state statutes which provide a system for the incorporation, regulation and liquidation of insurance companies?

3. Where a federal court has first acquired such jurisdiction and the proceedings therein are still pending, can a state court in a suit subsequently instituted appoint a receiver to wind up and liquidate the affairs of such insurance company?

ARGUMENT.

SUMMARY OF POINTS.

1. THE FEDERAL COURT HAS JURISDICTION OF A SUIT BY A NON-RESIDENT SHAREHOLDER AGAINST AN INSURANCE CORPORATION PRAYING FOR THE APPOINTMENT OF A RECEIVER IN ORDER TO ENFORCE AND ADJUST THE RIGHTS AND EQUITIES OF CREDITORS AND SHAREHOLDERS.

   (1) *Under its general equity jurisdiction, a federal court has the power to determine a corporation's solvency and to enforce and adjust the rights of creditors and shareholders thereof by the appointment of a receiver to wind up and liquidate the affairs of said corporation.*

   (2) *The equity jurisdiction of the federal courts is unlimited and applies to insurance companies even though state legislatures have provided complete systems for incorporation, supervision, and liquidation of such corporations.*

2. THE JURISDICTION OF THE STATE COURT OVER THE LIQUIDATION AND WINDING UP OF INSURANCE COMPANIES IS NOT EXCLUSIVE AND CANNOT EFFECT THE JURISDICTION OF THE FEDERAL COURT.

   (1) *The Insurance Code does not give exclusive jurisdiction to the state court.*

   (2) *The Insurance Code cannot limit or affect the jurisdiction of the federal court.*

3. THE JURISDICTION OF THE FEDERAL AND STATE COURTS BEING CONCURRENT, THE FEDERAL COURT FIRST ACQUIRED JURISDICTION AND IS THEREFORE ENTITLED TO RETAIN IT TO THE EXCLUSION OF THE STATE COURT.

(1) *The proceedings in the state court and in the federal court involve the same issues with regard to the same subject matter.*

(2) *The federal court first acquired jurisdiction, and is entitled to retain said jurisdiction to the exclusion of the state court.*

(3) *The jurisdiction of the federal court is unaffected by any proceedings by the Insurance Commissioner prior to the filing of the suggestion by the Attorney General, or by any subsequent proceedings in the state court.*

Point 1.

The federal court has jurisdiction of a suit by a non-resident shareholder against an insurance corporation praying for the appointment of a receiver in order to enforce and adjust the rights and equities of creditors and shareholders.

The jurisdiction of the federal courts is derived from Article III, Section 2, Clause 1 of the Constitution as follows:

> "The judicial Power shall extend . . . to Controversies . . . between citizens of different States . . . "

Section 1 of Article III of the Constitution provides, as follows:

> "The judicial power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."

Pursuant to said section, Congress established the district courts and by Section 24 of the Judicial Code [28 U. S. C. A. § 41 (1)] has conferred upon them original jurisdiction . . .

> "First. Of all suits of a civil nature at common law or in equity . . . where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3000, and . . . is between citizens of different states . . . ."

Thus the States, by adopting the Constitution, have surrendered and conferred upon the courts of the United States the unrestricted jurisdiction of suits in equity in cases of diversity of citizenship.

For many years it has been held that federal courts have jurisdiction generally to administer the affairs of

insolvent corporations at the suit of non-residents. This equitable relief has been granted generally without distinction as to the class or type of corporations involved.

(1) *Under its general equity jurisdiction, a federal court has the power to determine a corporation's solvency and to enforce and adjust the rights of creditors and shareholders thereof by the appointment of a receiver to wind up and liquidate the affairs of said corporation.*

In *Leadville Coal Co. v. McCreery,* 141 U. S. 475, 478 (1891), a receiver, appointed by the federal court, proceeded with the liquidation of the assets of the corporation for three years when he finally effected a sale of the corporation's property. An appeal was taken from the court's decree approving the sale. Pending the hearing of the appeal, the corporation was dissolved in the state court and another receiver was appointed for the corporation. The decree of the federal court was affirmed. On an appeal from the decree confirming the sale it was contended that the property should have been turned over to the state receiver and distributed by him. The decree of the circuit court was affirmed, this Court holding that the federal court "*having once acquired full jurisdiction and proceeded to a final determination, may rightfully proceed still further and to an execution of that decree, irrespective of any proceedings in the courts of the State.*" (Italics ours.)

In *Hollins v. Brierfield Coal & Iron Co.,* 150 U. S. 371 (1893), certain unsecured creditors filed a bill in equity asking for a receivership of the corporation's property. The corporation defended on the ground that the creditors were unsecured and the bill was properly dismissed for want of jurisdiction. The court, however, said on page 380:

> "Suppose the corporation and other defendants had made no defence, and, without expressly consenting, had made no objection to the appointment of a receiver, and the subsequent distribution of the assets of the corporation among its creditors; it cannot be doubted that a final decree providing for a settlement of the affairs of the corporation and a distribution among creditors could not have been challenged on the ground of a want of jurisdiction in the court, and that notwithstanding it appeared upon the face of the bill that the plaintiffs were simple contract creditors; because *the administration of the assets of an insolvent corporation is within the functions of a court of equity,* and the parties being before the court, it has power to proceed with such administration." (Italics ours.)

This principle has been affirmed in the recent cases of *United States v. Butterworth Corporation*, 269 U. S. 504 (1926), and *Shapiro v. Wilgus*, 287 U. S. 348 (1932). See also *Brown v. Lake Superior Iron Company*, 134 U. S. 530 (1890).

The jurisdiction of the federal courts to marshal and preserve the assets of a railway company by an equity receivership was recognized in *Metropolitan Railway Receivership*, 208 U. S. 90, 109 (1908).

In that case the court pointed out that the *jurisdiction of the federal courts was based on diversity of citizenship* and not on the fact that the railroad might or might not be engaged in interstate commerce.

As early as 1872, this Court recognized that the appointment of corporate receivers with enlarged powers to manage, liquidate and sell the corporate assets was a necessary incident in the court's dispensation of equitable relief. In *Davis v. Gray*, 16 Wall. 203, 219 (1872), Mr. Justice Swayne said:

"In the progress and growth of equity jurisdiction it has become usual to clothe such officers with much larger powers than were formerly conferred. In some of the States they are by statutes charged with the duty of settling the affairs of certain corporations when insolvent, and are authorized expressly to sue in their own names. It is not unusual for courts of equity to put them in charge of the railroads of companies which have fallen into financial embarrassment, and to require them to operate such roads, until the difficulties are removed, or such arrangements are made that the roads can be sold with the least sacrifice of the interests of those concerned. In all such cases the receiver is the right arm of the jurisdiction invoked. *As regards the statutes, we see no reason why a court of equity, in the exercise of its undoubted authority, may not accomplish all the best results intended to be secured by such legislation without its aid.*" (Italics ours.)

The jurisdictional right of federal courts to administer the property of insolvent corporations such as insurance companies, building and loan associations, public utilities, railroads and corporations generally through equity receiverships has been recognized for a long time by the Circuit Courts of Appeals and federal courts of first instance.

Centmont Corporation v. Marsch, 68 F. (2d) 460 (C. C. A. 1st 1933) (railroad) Certiorari denied, 291 U. S. 680 (1934);

Pennsylvania Steel Co. v. New York City Ry. Co., 198 Fed. 721 (C. C. A. 2d 1912) (railroad) affirmed *In re Metropolitan Railway Receivership, supra;*

U. S. Shipbuilding Co. v. Conklin, 126 Fed. 132 (C. C. A. 3d 1903) (shipbuilding corpora-

tion); *O'Neil v. Welch*, 245 Fed. 261 (C. C. A. 3d 1917) (insurance company); *Scattergood v. American Pipe and Construction Co.*, 249 Fed. 23 (C. C. A. 3d 1918) (public utility corporation which supplied water to municialities);

Universal Savings & Trust Co. v. Stoneburner, 113 Fed. 251 (C. C. A. 4th 1902) (building and loan association);

Southern Trust Co. v. Austin, 30 F. (2d) 893, (C. C. A. 5th 1929) (land mortgage company and trust company). Certiorari denied, 279 U. S. 874 (1929);

Wilson v. Parvin, 119 Fed. 652 (C. C. A. 6th 1903) (building and loan association);

Havner v. Hegnes, 269 Fed. 537 (C. C. A. 8th 1920) (packing corporation);

Hardy v. North Butte Mining Co., 22 F. (2d) 62 (C. C. A. 9th 1927) (mining corporation);

Superior Oil Corporation v. Matlack, 47 F. (2d) 993 (C. C. A. 10th 1931) (oil corporation);

Towle v. American Bldg., Loan & Inv. Soc., 60 Fed. 131 (C. C. N. D. Ill. 1894) (building and loan association); *Morrill v. American Reserve Bond Co.*, 151 Fed. 305 (C. C. Mo. 1907) (bond investment company); *Alexander v. Southern Home Building & Loan Ass'n*, 110 Fed. 267 (C. C. N. D. Ga. 1900) (building and loan association); *Lewis v. American Naval Stores Co.*, 119 Fed. 391 (C. C. E. D. La. 1902) (general business corporation); *Solomons v. American B. & L. Ass'n*, 116 Fed. 676 (C. C. N. D. Ga.

1902) (building and loan association); *Flinn v. Interstate B. & L. Ass'n,* 141 Fed. 672 C. C. S. C. 1905) (building and loan association).

In *U. S. Shipbuilding Co. v. Conklin, supra,* the Court said (p. 136):

> "But *the bill of complaint* here does not rest upon the statute of New Jersey exclusively. It *sets forth a case cognizable by the court under its general equity powers. The bill not only alleges that the defendant corporation was insolvent, but,* as we have seen, it *charges that such insolvency was produced by the gross mismanagement of its directors;* and, furthermore, the bill charged the directors with positive misconduct involving breach of trust. Insolvency of a corporation, coupled with gross mismanagement of its affairs by its board of directors, and such misconduct of the directors as is here charged justify the appointment of a receiver by a court of equity independently of any statutory authority." (Italics ours.)

In *Towle v. American Bldg., Loan & Inv. Soc., supra,* the Court, after having appointed a receiver for the building and loan association, said (p. 132):

> "It is urged that this court had no jurisdiction to appoint the receiver—First, because the case made out by the bill and answer does not, within the rules of equitable jurisdiction as required and enforced in the Federal Courts, justify the appointment of a receiver; . . . I have no doubt that courts of equity have the ultimate power of administering the assets of insolvent corporations."

(2) *The equity jurisdiction of the federal courts is unlimited and applies to insurance companies even though state legislatures have provided complete systems for incorporation, supervision, and liquidation of such corporations.*

The opinion of the Supreme Court of Pennsylvania, as we understand it, in effect holds that the existence of state statutes governing the incorporation, regulation and liquidation of insurance corporations puts such corporations beyond the equity jurisdiction of federal courts at the suit of a non-resident shareholder.

The original grant of equity jurisdiction to the federal court in cases of diversity of citizenship is in the most general terms. It has not been restricted by Congress as to subject matter of litigation or parties. No distinction is made between real and artificial parties. The Judicial Code does not exempt from its jurisdiction particular kinds of corporations or particular kinds of businesses.

On the contrary, the decisions sustain the petitioner's contention that the federal court has jurisdiction in cases of diversity of citizenship regardless of the character of the defendant corporation or its business.

It has been held that the federal court has jurisdiction over an insurance corporation even though the state of its incorporation had enacted statutes providing for its incorporation, management and liquidation.

In *O'Neil v. Welch,* 245 Fed. 261, a shareholder's bill similar to the bill of Samuel Lando, in the instant case, was filed in the same federal court against the Union Casualty Insurance Company. The averments in both cases were substantially the same as was the relief prayed for.

That case was first decided by the district court under the title of *Welch v. Union Casualty Insurance Company,* 238 Fed. 968 (D. C. Pa. 1917). The district court held that it had jurisdiction to entertain the bill and to grant the relief sought. That conclusion was affirmed by the Circuit Court of Appeals which, however, reversed the lower court for the reason that proceedings were started in the state court a month before the bill in equity was filed in the federal court and that the state court, having first acquired jurisdiction, was entitled to retain it without interference from the federal court. In that case the court said (page 265):

> "The starting point in this controversy, therefore, is the jurisdiction of the two courts. *It cannot be doubted that the Federal Court, in the exercise of its general equity jurisdiction, has power to appoint a receiver on a stockholder's bill, determine a corporation's solvency and distribute its assets, and that no State statute can impair or destroy that power."* (Italics ours.)

Mitchell v. Maurer, 69 F. (2d) 233 (C. C. A. 9th 1934) is another case which recognizes the power of the federal courts to liquidate and wind up insolvent and unsound insurance companies. In that case the defendant insurance company was declared insolvent in proceedings before the Court of Chancery of the State of Delaware. A bill in equity was filed in the federal court in California which bill as amended prayed for the appointment of ancillary receivers to liquidate such property of the insurance company as was within that jurisdiction. Within an hour thereafter, proceedings under the California insurance laws were instituted by the state insurance commissioner in the state court by which he sought to be placed in possession of the property and busi-

ness of the insurance company for the liquidation thereof under the state insurance laws similar to those involved in this proceeding. In that case the Circuit Court of Appeals likewise held that the federal court had concurrent jurisdiction over the liquidation and winding up of insolvent and unsound insurance companies and that, since the federal court first assumed jurisdiction, the lower court's denial of the insurance commissioner's motion to annul its order appointing ancillary receivers, should be affirmed.

In said case a writ of certiorari has been granted and argument already heard by this Court. (No. 54, October Term 1934.) The question under review, however, seems to have been restricted to whether the federal court in California had jurisdiction to appoint ancillary receivers merely upon application therefor by primary receivers appointed by the chancery court of the State of Delaware and not whether the federal court has jurisdiction to administer the affairs of a defunct insurance company.

Elson v. Mortgage B. & L. Association, 4 F. Supp. 779 (D. C. Pa. 1933), now on review by writ of certiorari granted by this Court, (No. 394, October Term 1934) concerns the administration of an insolvent and unsound building and loan association through the appointment of a receiver by the federal court.

The bill filed in the federal court in the *Elson* case so parallels that filed by Samuel Lando against the petitioner that a statement of its various allegations and prayers would practically be a repetition of the matters set forth in paragraph four of the Statement of the Case (R. 6).

In the *Elson* case Judge Welsh in deciding that the federal court had jurisdiction for the liquidation and winding up of quasi-public corporations, said: (p. 780)

"Have the federal courts jurisdiction to appoint receivers for building and loan associations? The appointment of receivers in equity in proper cases for corporations is but a branch of the equity jurisdiction of this court, and in absence of an act of Congress specifically exempting building and loan associations from such jurisdiction, it is hard to see upon what ground the assertion of lack of jurisdiction can logically rest. No extensive review of pertinent authorities should be necessary in view of the clear and convincing opinion of Judge Woolley of our Circuit Court of Appeals in the case of O'Neil v. Welch, 245 F. 261, 265 (C. C. A. 3 1917), where in setting aside the appointment of a receiver of an insurance company at the instance of the insurance commissioner of Pennsylvania, because the doctrine of comity required the federal courts to refuse to take jurisdiction after proceedings had first been begun in the state court, it was said:

" 'It cannot be doubted that the Federal court, in the exercise of its general equity jurisdiction, has power to appoint a receiver on a stockholder's bill, determine a corporation's solvency and distribute its assets, and that no State statute can impair or destroy that power.' "

The decree in the *Elson* case was unanimously affirmed by the Circuit Court of Appeals for the Third Circuit in the case of *Commonwealth of Pennsylvania v. Williams, et al.*, 72 F. (2d) 509 (C. C. A. 3d 1934).

Judge Davis of that court considered the question whether "the jurisdiction of the Federal Court, conferred by Federal statutes in accordance with the power granted to Congress by the Constitution" is "ousted by the public policy of the Commonwealth". After a review of the federal cases on this question and a searching analysis of the cases relied upon by the Supreme Court in Pennsylvania in

deciding the instant case, Judge Davis concluded that the jurisdiction of the federal court was not affected or limited by any public policy of the Commonwealth. He said: (p. 516)

> "Congress has expressly conferred jurisdiction upon federal courts to appoint receivers in equity upon a stockholder's bill in such a case, and that power cannot be taken away by state Legislatures.
>
> "Further, we have not been referred to a single case, by very industrious and competent counsel, which holds that in a proper case a federal court sitting in equity is without power to appoint a receiver for a building and loan association. The Attorney General, able and brilliant, virtually admits that the District Court did have jurisdiction, but ought not to have exercised it, for he says: 'We are urging not that the District Court was technically without jurisdiction, but that it ought not to have exercised its jurisdiction.' "

The cases relied upon by the Supreme Court of Pennsylvania in holding that equitable jurisdiction to administer the property of an insolvent quasi-public corporation had been disclaimed by the federal appellate courts do not support that conclusion. (R. 39.)

An analysis of these cases will reveal that none of them is decisive of the question under consideration.

As stated by Judge Davis in *Commonwealth of Pennsylvania v. Williams, supra,* at page 516, after a separate discussion of each of the cases:

> "In not one of the federal cases cited or quoted in the Pennsylvania decision has the question in the case at bar, the jurisdiction of the federal court on a controversy involving quasi public corporations arising between citizens of different states, been in issue, and not a single court in those cases has pronounced upon it."

Port Newark Nat. Bank v. Waldron, 46 F. (2d) 296 (C. C. A. 3d 1930) did not concern a contest between two courts claiming concurrent jurisdiction, but between two branches of the federal government. In that case the Circuit Court of Appeals was merely considering the question of distribution of federal power, and held that, since the executive branch had already exercised "dominion" over the assets of the Bank through the Comptroller of the Currency prior to the filing of the bill, the federal court should have refused to exercise its jurisdiction.

Lyon v. McKeefrey, 171 Fed. 384 (C. C. A. 3d 1909) involved the receivership of a Pennsylvania banking corporation. Its assets exceeded its liabilities, but could not presently be converted into cash. A bill was filed in the federal court for the appointment of receivers, and the corporation filed its answer and joined in the prayer for such appointment "to the end that all the creditors of the respondent be paid in full, without loss and sacrifice of its assets, so as to preserve the same for its stockholders as well".

Receivers were appointed. The assets having then been liquidated and creditors paid, there remained a surplus. The Attorney General meanwhile proceeded in the state court under the statute regulating banking corporations and had the corporation dissolved and a receiver appointed to wind up its affairs. The federal court directed that the surplus be turned over to the state receiver, because the federal court had no authority to dissolve the corporation and the bill, which the Court would not allow to be amended, contained no prayer for distribution of surplus.

In that case Judge Gray said: (p. 391)

> "No question as to the right of the court below to take jurisdiction of the cause presented to it by the bill and answer filed October 23, 1907, is here raised. In their brief the counsel for the appellant say:

> " 'Our position is that for the purpose of this case we concede the jurisdiction of the circuit court and its receivers to administer this estate up until the time that all creditors had been paid in full and the rights of the complainants in the bill determined, and that the jurisdiction to this extent was not affected nor the proceedings abated by the subsequent dissolution of the corporation by the decree of the state court.' "

Consequently this case has no bearing on the question at issue.

In *Mitchell v. Lay,* 48 F. (2d) 79 (C. C. A. 9th 1931) the question before the Court was whether a federal court could take assets which a foreign insurance company had deposited with the Insurance Commissioner, pursuant to state statute, as somewhat in the nature of a qualifying bond for the foreign insurance company to do business in the State of California. In that case it was held that the federal court would not direct the insurance commissioner to apply such funds contrary to the terms of the statute under which they were held, and that the petitioner should first have exhausted her remedy against the particular fund before seeking equitable relief.

In *Lee v. Edmunds,* 66 F. (2d) 122 (C. C. A. 5th 1933) proceedings had been instituted in the state court several months prior to the time of filing petition in the federal court, and consequently the federal court was unable to exercise its jurisdiction.

In *Bank of Bay Biscayne v. Hankins,* 42 F. (2d) 209 (C. C. A. 5th 1930), the Court decided that the circumstances of the case did not warrant its intervention, but impliedly recognized that it had jurisdiction which it could exercise if it saw fit so to do. Furthermore, it appears from the facts, as set forth in the opinion, that the state court had taken possession of the bank prior to the institution of proceedings in the federal court.

We submit, therefore, that the foregoing cases are not authority for the proposition of the Supreme Court of Pennsylvania that federal courts have disclaimed jurisdiction in cases similar to that under consideration. On the contrary, in our opinion, they show that the federal courts not only recognize that they have such jurisdiction but have exercised it.

Point 2.

The jurisdiction of the state court over the liquidation and winding up of insurance companies is not exclusive and cannot effect the jurisdiction of the federal court.

In the court below it was contended by the petitioner that the state Insurance Code had not conferred exclusive jurisdiction on its state courts with regard to the liquidation and winding up of insurance companies. In answer to this, the Supreme Court of Pennsylvania in its opinion said:

> "We think the latter fact of little or no consequence for the reason that if the Federal Court has jurisdiction, its cognizance of the actions could not be ousted by a state statute declaring that its courts have exclusive jurisdiction." (R. 28.) *Commonwealth ex rel. v. Penn General Casualty Co., supra* at page 4.

In effect, however, the decision of the Supreme Court of Pennsylvania holds that the equity jurisdiction of federal courts based on diversity of citizenship is limited so as not to extend to so-called quasi public corporations which are incorporated and regulated by a system of state statutes.

This is tantamount to saying that a state may by its statutes limit the jurisdiction of federal courts.

In the absence of the pendency in the federal court of any proceeding involving the same issues and subject mat-

ter, the state court under the Act of May 17, 1921, P. L. 789, § 501 et seq. (40 P. S. § 201 et seq.) has jurisdiction to liquidate and wind up insolvent and unsound insurance companies. By the Insurance Code of Pennsylvania—as set forth in the Insurance Department Act of 1921, approved May 17, 1921, P. L. 789 (40 P. S. § 1 et seq.) and the Insurance Company Law of 1921, approved May 17, 1921, P. L. 682 (40 P. S. § 341 et seq.)—there has been provided a system for the incorporation, supervision and liquidation of insurance companies. However, the jurisdiction therein conferred upon the state courts with regard to the liquidation and winding up of insurance companies is not exclusive.

(1) *The Insurance Code does not give exclusive jurisdiction to the state court.*

There is no specific provision in the insurance laws giving the state court sole and exclusive jurisdiction for the appointment of receivers for insurance companies.

A reading of the Insurance Code does not justify even the inference that it was intended to provide the only method whereby an insurance company could be liquidated and its business wound up. The Insurance Department Act of 1921, *supra,* recognizes that receivers may be appointed for insurance companies by the several courts of the Commonwealth in suits instituted by private litigants. The provisions of said Act bearing on this point are as follows:

> "Section 507. *Insurance Commissioner to Supersede Other Receivers.*—Whenever a receiver of an insurance company, association, exchange, society, or order is appointed by any court of this Commonwealth, on motion of the Attorney General at the instance of the Insurance Commissioner, such receiver shall forthwith supersede any receiver previously appointed by

the decree of any court of this Commonwealth, and shall likewise supersede any assignee or trustee previously appointed by such insurance company, association, exchange, society, or order." (40 P. S. § 207.)

"Section 508. *Superseded Receivers, Et Cetera, To Deliver Over Property and File Accounts.*—Such superseded receiver, assignee, or trustee shall forthwith pay over and deliver all moneys, securities, assets, and property of such insurance company, association, exchange, society, or order in his or their custody, possession, or control to the receiver appointed as aforesaid on motion of the Attorney General, and shall likewise file his or their account in the court having jurisdiction of such superseded receiver, assignee, or trustee, which court shall allow credit for compensative counsel fees and expenses and for disbursements which shall have been properly earned, incurred, or made, prior to the appointment of the receiver made on motion of the Attorney General as aforesaid." (40 P. S. § 208.)

It is to be noted that Section 507 (40 P. S. § 207), above quoted, contemplates that a receivership of an insurance company may exist independent of the action to be taken by the Attorney General, as provided by Section 502 of said act (40 P. S. § 202), since provision is made therein for the Attorney General to move the court for the appointment of the Insurance Commissioner as receiver who shall forthwith supersede receivers otherwise previously appointed. And furthermore Section 508 (40 P. S. § 208), above quoted, specifically provides for the payment of counsel fees, expenses and disbursements incurred prior to appointment of the receiver on motion of the Attorney General. In fact there is nothing in said act which prevents a receiver appointed by a state court upon application of a private litigant from conducting said receivership to final conclusion, except the

institution of proceedings by the Attorney General under Section 507.

The above provision contemplates that all competent state courts shall have the power to appoint receivers and to administer the affairs of insurance companies at the instance of a private litigant.

It is evident, therefore, that the Insurance Code does not even attempt to provide that the sole and exclusive method of winding up an insurance company shall be that prescribed by Section 502 of the Insurance Department Act of 1921, *supra,* (40 P. S. § 202) wherein proceedings must be initiated by the Attorney General.

(2) *The Insurance Code cannot limit or affect the jurisdiction of the federal court.*

Although the Supreme Court of Pennsylvania in its opinion, above quoted, has recognized that a state statute cannot oust the jurisdiction of the federal court, the effect of this decision is to accomplish that which it admits could not have been expressly done by the legislature.

The jurisdiction of the federal courts cannot be limited either directly or indirectly by enactments of the state legislatures or by decisions of the state judiciary.

In *Chicot County v. Sherwood,* 148 U. S. 529, 534 (1893), this Court reaffirmed the principle that a state legislature cannot limit or curtail the jurisdiction of the federal courts, saying:

> "In Hyde v. Stone, 20 How. 170, 175, it is said: 'But this court has repeatedly decided that the jurisdiction of the courts of the United States over controversies between citizens of different States cannot be impaired by the laws of the States, which prescribe the modes of redress in their courts, or which regulate the

distribution of their judicial power. In many cases state laws form a rule of decision for the courts of the United States, and the forms of proceeding in these courts have been assimilated to those of the States, either by legislative enactment or by their own rules. *But the courts of the United States are bound to proceed to judgment and to afford redress to suitors before them in every case to which their jurisdiction extends. They cannot abdicate their authority or duty in any case in favor of another jurisdiction. Suydam v. Broadnax,* 14 Pet. 67; *Union Bank v. Jolly's Administrators,* 18 How. 503.' " (Italics ours.)

Farrell v. Stoddard, 1 F. (2d) 802, 804 (N. D. N. Y. 1924), is a case very much in point on this question. In the opinion, the following principle is set forth:

"But the defendant also asserts that the Legislature has provided a method for the liquidation of the business, assets, and affairs of insurance companies by the defendant, to which all claimants must confine themselves, and that plaintiff has not done so. *The statute in question does not assert that the method thus provided shall be exclusive as do certain other statutes of the state.* It is held on excellent authority that, where a remedy exists at common law and a remedial statute is directed at the same wrong, if such statute provides a larger or summary or more efficient remedy for the party aggrieved, but does not in terms or by necessary implication deprive the party injured of the remedy which existed at common law, the statutory remedy is considered as merely cumulative and the party injured may resort to either at his election. Rosin v. Lidgerwood Manufacturing Co., 89 App. Div. 245, 86 N. Y. S. 49; McGraw v. Gresser, 226 N. Y. 57, 123 N. E. 84. This doctrine applies also to rights existing under equitable rules. . . .

"Even if the statute had in so many words expressed the intent to supersede the existing equitable

and common-law rights, and to provide an exclusive method, it may well be doubted whether it would have any force or effect as to this plaintiff, a resident of Massachusetts, who is not subject to the jurisdiction of the laws of the state of New York as to his equitable or common-law rights, and has not sought the aid of the state courts. If the state of New Jersey may, by legislative act, change the rights or remedies of a citizen of Massachusetts, it may change the rights or remedies of citizens of any other state and of all the states, and its power would, to the extent of rights arising from property existing in or illegally transferred to the state of New York, be equal to that of Congress. Such contention could not be maintained. *In case of diversity of citizenship, one who elects to assert his equitable or common-law rights in a federal court cannot be deprived of them by the statutes of the state in which the federal court happens to exercise jurisdiction at the time.* Morrill v. American Reserve Bond Co. (C. C.) 151 F. 305; Chicot County v. Sherwood, 148 U. S. 529, 13 S. Ct. 695, 37 L. Ed. 546. A federal court may not abdicate its duty or authority in any case in favor of another jurisdiction. Kline v. Burke Construction Co., 260 U. S. 226, 234, 43 S. Ct. 79, 67 L. Ed. 226, 24 A. L. R. 1077." (Italics ours.)

See also *Straine v. Bradford*, 88 Fed. 571 (C. C. Vt. 1898).

Thus, the state legislature, in providing that the receiver appointed upon motion of the Attorney General shall supersede any receiver already appointed by another state court, has in effect centralized the procedure in state courts and practically set up a uniform *state* system for winding up insolvent insurance companies which, however, is not and was not intended to be exclusive so far as it might relate to the jurisdiction of the federal court.

The Pennsylvania Insurance Code does not confer jurisdiction but merely regulates the venue as between the various state courts of common pleas. It contains no provision which attempts to limit the jurisdiction of the federal court.

On the contrary, the system has been centralized to the extent that now, to all intents and purposes, there are only two effective ways available for the liquidation and winding up of insolvent and unsound insurance companies—proceedings in equity in the federal court or in the state court under the Insurance Department Act of 1921.

Point 3.

The jurisdiction of the federal and state courts being concurrent, the federal court first acquired jurisdiction and is therefore entitled to retain it to the exclusion of the state court.

(1) *The proceedings in the state court and in the federal court involve the same issues with regard to the same subject matter.*

The Statement of the Case (R. 5) shows that although the plaintiffs in each of the two proceedings are different parties, one of which proceeded by bill in equity and the other by a suggestion, the allegations in support of their respective suits are substantially the same, and the relief sought by each is likewise the same. Each party has alleged in its respective pleading that the petitioner has been mismanaged, its capital impaired, and that its condition is unsafe and unsound (R. 7, 8); and both the bill in equity and the suggestion pray for the appointment of a receiver, the winding up of the affairs of the petitioner, and the liquidation of its assets (R. 7, 8). In addition thereto, the sugges-

tion further prays for the vacation of the petitioner's charter and the dissolution of the company (R. 8).

(2) *The federal court first acquired jurisdiction, and is entitled to retain said jurisdiction to the exclusion of the state court.*

The federal court acquired jurisdiction of the subject matter in controversy on November 17, 1933, when Samuel Lando filed his bill in equity (R. 6). Not until December 8, 1933, twenty-one days thereafter, did the Attorney General file his suggestion in the state court (R. 8).

The rule with regard to the acquisition of jurisdiction as between two courts of concurrent jurisdiction and the priority acquired by one upon the filing of a bill in equity in a suit involving the same issues and regarding the same subject matter has been succinctly stated by the late Mr. Chief Justice Taft in *Harkin v. Brundage*, 276 U. S. 36, 43 (1928) as follows:

> "The principle which should govern in a conflict of jurisdiction like this has been a number of times stated by this Court. As between two courts of concurrent and coordinate jurisdiction, *the court which first obtains jurisdiction and constructive possession of property by filing the bill is entitled to retain it without interference* and can not be deprived of its right to do so because it may not have obtained prior physical possession by its receiver of the property in dispute; but where the jurisdiction is not the same or concurrent, and the subject matter in litigation in the one is not within the cognizance of the other, or there is no constructive possession of the property in dispute by the filing of a bill, it is the date of the actual possession of the receiver that determines the priority of jurisdiction. Moran v. Sturges, 154 U. S. 256, 283, 284; Palmer v. Texas, 212 U. S. 118; Wabash Railroad v. Adelbert

College 208 U. S. 38, 54; Farmers' Loan and Trust Company v. Lake Street Railroad Company, 177 U. S. 51, 61; and Adams v. Mercantile Trust Company, 66 Fed. 617. The difficulty in the application of the rule is in determining whether the conflicting jurisdictions are actually concurrent and the same." (Italics ours.)

In *Palmer v. Texas*, 212 U. S. 118 (1909) this Court held that a state court, having first obtained jurisdiction of an oil company for the purpose of liquidating the same, was entitled to retain said jurisdiction to the exclusion of the local federal court in which a bill in equity had subsequently been filed for the same purpose.

This rule was likewise applied in the case of *O'Neil v. Welch, supra,* in which the federal court refused to exercise its jurisdiction because prior proceedings had already been begun in the state court. In that case the Court said on page 265:

> "When, therefore, we find which court first obtained jurisdiction of this controversy, we have answered the question as to which should retain it."

See also *Mitchell v. Maurer, supra; Commonwealth of Pennsylvania v. Williams, et al., supra;* and *Ward v. Foulkrod,* 264 Fed. 627 (C. C. A. 3d 1920).

An application of the aforesaid stipulated facts with regard to the filing of the bill in equity in the federal court and the suggestion in the state court to the aforesaid principle of law requires the conclusion that the jurisdiction to liquidate and wind up the affairs of the petitioner was first acquired by the federal court on November 17, 1933 when the aforesaid bill in equity was filed by Samuel Lando, and that pending the disposition of the said bill in equity, the state court was without jurisdiction to proceed in the case instituted therein by the Attorney General.

(3) *The jurisdiction of the federal court is unaffected by any procedings by the Insurance Commissioner prior to the filing of the suggestion by the Attorney General, or by any subsequent proceedings in the state court.*

The record further discloses that, following the receipt of information that the assets of the petitioner had been depleted, a hearing was held before the Insurance Commissioner on September 14, 1933, at which time the then president of the petitioner was ordered to return to the petitioner all the assets he had removed (R. 5). Pursuant to notice a formal hearing was held before the Attorney General on October 14, 1933 (R. 6). Thereafter the Insurance Commissioner conducted negotiations with shareholders of the petitioner for the purpose of possibly effecting a financial rehabilitation of the company (R. 6).

The statute under which the Insurance Commissioner was proceeding required him to communicate to the Attorney General the facts which would form the basis of the subsequent action by the Attorney General when he applied to the Court of Common Pleas of Dauphin County, or to the court of any county in which the principal office of the company is located, for an order to show cause why the business should not be closed. Act of May 17, 1921, P. L. 789, § 502 (40 P. S. § 202). Such acts, however, on the part of the Insurance Commissioner and Attorney General (prior to his application to the state court) do not confer jurisdiction upon the state court. The Insurance Commissioner is required to hold a hearing before he may seek the assistance of the court. Such hearing may establish that no reason exists for taking over a company. In such case the matter will never even come to the attention of the Court.

That the legislature thought it advisable for the Insurance Commissioner to take these preliminary steps before actual legal proceedings can be instituted is a matter peculiarly within the province of the legislature. But, as provident and wise as such preliminary measures may be in protecting the interests of the public and in the prevention of possible unjustified or hasty proceedings against insurance companies, jurisdiction does not attach until procedings have actually been instituted in the state court.

It is interesting to note that the Insurance Commissioner waited almost two months from the date of the hearing and almost a month after the filing of the bill in equity by Samuel Lando before he instituted legal proceedings. In no sense of the word can it be said that there was a race between the two courts or between various interested parties as to which court should liquidate the company.

A similar situation arose in the case of *Elson v. Mortgage Building & Loan Association*, 4 F. Supp. 779. There the Secretary of Banking held a meeting with the officers and directors of the association in June of 1931; then he waited until October 28, 1932, when he asked for a financial report; while on December 6, 1932, he advised the officers that the association was insolvent. However, on February 9, 1933, a bill in equity (similar to the bill in equity of Samuel Lando) was filed in the federal court by a non-resident shareholder. Thereafter, on February 14, 1933, the Secretary of Banking served notice on the officers of the association of a hearing to be held on February 17, 1933, after which the Secretary on the very same day filed his "Certificate of Possession" in the Court of Common Pleas of Philadelphia County.

In that case, the Court held that the federal court by the filing of the said bill in equity first acquired jurisdiction

and rightly refused to consider such preliminary meetings as being equivalent to the institution of legal proceedings. As stated by Judge Welsh on pages 783 and 784, such actions amounted at the most to nothing more than a mere monition. They "did not even rise to the dignity of a restraining order" which, when "issued by a state court, is not the equivalent to the commencement of an action for the appointment of a Receiver."

The fact that the state court proceeded to a final hearing in the instant case, and actually appointed a receiver, cannot deprive the federal court of jurisdiction which it had first acquired. Such proposition is untenable, for if the state court did not obtain jurisdiction upon the filing of the suggestion therein by the Attorney General, no subsequent proceeding on its part could supply it. *Harkin v. Brundage, supra.*

For the same reason, we submit that the fact that the state court in the instant case issued a restraining order one day before the federal court issued its restraining order in the suit by Samuel Lando (R. 9, 10) is immaterial so far as the question of determining which court acquired jurisdiction is concerned. In controversies of this nature, the issuing of injunction can neither deprive one court of jurisdiction which it has acquired nor confer such jurisdiction on another court, *Mitchell v. Maurer, supra.*

In the case of *O'Neil v. Welch, supra,* the federal court appointed a receiver who actually took possession of the assets of the insurance company. Such actions, however, were held to be of no avail, so far as the question of jurisdiction was concerned, and the assets of the insurance company were turned over to the receiver of the state court in which proceedings had first been instituted.

Likewise, in *Mitchell v. Maurer, supra,* the Circuit Court of Appeals for the Ninth Circuit held that the issuance of a restraining order and of an order for the State Insurance Commissioner to take into his possession, as receiver, the property of the insolvent company was immaterial, inasmuch as the federal court had already acquired jurisdiction by the filing of a petition therein prior to the institution of proceedings in the state court.

Therefore, the actions of the Insurance Commissioner prior to the filing of the suggestion in the state court, and the actions of the state court in issuing its restraining order and in entering the final decree appointing a liquidator were inconsequential so far as concern the determination of what court first secured jurisdiction of the petitioner. Such actions were ineffectual to give the state court jurisdiction to the exclusion of the federal court which had already acquired jurisdiction by the filing therein of the aforesaid bill in equity. The federal court is entitled to retain that jurisdiction until it has finally disposed of said proceeding.

We submit, therefore, that the federal court first acquired jurisdiction over the liquidation and winding up of the affairs of the petitioner, and is entitled to retain said jurisdiction to the exclusion of the state court.

CONCLUSION.

We, therefore, respectfully submit:

1. That the federal court has jurisdiction of a suit brought by a non-resident shareholder of an insurance corporation for the enforcement and adjustment of the rights and equities of the creditors and shareholders thereof through the administration of its property by a receiver duly appointed to wind up and liquidate the affairs of said corporation;

2. That the jurisdiction of the state court over the liquidation and winding up of an insurance company is not exclusive, and cannot limit the jurisdiction of the federal court;

3. That the jurisdiction of the federal and state courts being concurrent, the federal court first acquired jurisdiction and therefore is entitled to retain it to the exclusion of the state court;

4. That the Court of Common Pleas of Dauphin County had no jurisdiction to enter the final decree appointing a liquidator to take possession of the business and property of the petitioner; and

5. That the decree of the Supreme Court of Pennsylvania should be vacated, with costs here and in the Courts below.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1934. No. 431

PENN GENERAL CASUALTY COMPANY,
Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA, ex rel.

WM. A. SCHNADER, *Attorney General*

BRIEF FOR RESPONDENT

On Writ of Certiorari to the Supreme Court of the Commonwealth of Pennsylvania

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IN THE

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PENN GENERAL CASUALTY COMPANY,
Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA, EX REL.
WM. A. SCHNADER, *Attorney General*

BRIEF FOR RESPONDENT

On Writ of Certiorari to the Supreme Court of the Commonwealth of Pennsylvania

---

STATUTES INVOLVED

In addition to the Pennsylvania statutes referred to by the petitioner on page 2 of its brief, namely, The Insurance Department Act of 1921 and The Insurance Company Law of 1921, reference is also made to provisions of The Administrative Code of 1929, approved April 9, 1929, P. L. 177. Sections 1501 and 1502 thereof, and likewise sections of the other two Pennsylvania acts, are printed in the appendix to this brief, beginning at page 53.

ADDITIONS TO PETITIONER'S STATEMENT OF THE CASE

Penn General Casualty Company was chartered by the Governor of Pennsylvania on December 26, 1923, under the provisions of "The Insurance Company Law of 1921." Pursuant to its purpose the company conducted a general casualty insurance business under the supervision of the Insurance Commissioner of Pennsylvania (R. 5).

Early in September, 1933, the Commissioner received information to the effect that the company's assets had been seriously depleted. At once he made an examination of the company's affairs. While this examination was in process the Commissioner cited the company's officers and directors to a hearing (R. 6).

On September 14, 1933, at the hearing held at Harrisburg it was established that C. B. Love, then the company's President, had improperly removed assets of the company and made illegal investments for the company. He was ordered to make immediate restitution (R. 6).

On October 4, 1933, the examination of the company's affairs was concluded. Thereupon the company's officers and directors were summoned to a formal hearing before the Attorney General because the Insurance Commissioner felt, as a result of the examination, that the company was in an unsafe and unsound condition (R. 6).

On October 14, 1933, at the hearing, it was established that the further transaction of business by the company would be hazardous to its policyholders, its creditors and the public (R. 27).

However, the Commissioner undertook to assist the company in an effort to rehabilitate its affairs and place it in a position to resume business. Negotiations were conducted with shareholders of the company holding approximately ninety-five per centum of its capital stock. From time to time officers and directors of the company met with the Insurance Commissioner pursuant to the intention of all parties to do everything possible to save the company (R. 6, 27).

While these negotiations were in progress, Samuel Lando, claiming to hold four shares of the company's capital stock and to reside in West Virginia, on November 17, 1933, filed with the District Court of the United States for the Eastern District of Pennsylvania, a bill in equity asking for the appointment of receivers. A copy of the bill and a citation from the district court, were served on the company on November 22, 1933 (R. 6, 9).

Meantime, efforts of the Insurance Commissioner, in conjunction with shareholders, to rehabilitate the company's affairs and permit it to resume business had been carried on; but eventually they proved fruitless.

Accordingly, on December 8, 1933, the Attorney General proceeded, according to Pennsylvania law, by filing with the Court of Common Pleas of Dauphin

County a suggestion asking for a rule on the company to show cause why it should not be dissolved, its charter vacated, and its affairs liquidated by the Insurance Commissioner, and for an injunction to restrain the company from transacting business and disposing of its assets (R. 8, 9).

On the same date, the State court entered an order to show cause containing the preliminary injunction requested by the Commonwealth. On December 11, 1933, the suggestion and order were served on the company (R. 9).

On December 14, 1933, the State court issued an additional order restraining defendant from the further conduct of business and from disposing of or in any way dealing with its property or assets (R. 9, 10).

On December 14, 1933, the company filed its answer to the bill in the Federal court. It denied that the complainant was the registered owner of four shares of stock but admitted there had been improper withdrawal of assets and illegal investments. It denied that the present management was improper and averred that the offending parties had no longer control of the company's affairs. It also averred the pendency of the proceedings in the state court (R. 9).

On December 15, 1933, the Federal court issued a restraining order enjoining all parties from "interfering in any way with the present possession of the books, papers, records and assets, and business" of the company (R. 18). Thereafter the Federal court

took no further action in the Lando proceeding (R. 12).

On January 17, 1934, hearing was held in the State court and testimony taken in support of the Commonwealth's contentions. No testimony was offered by the company (R. 12).

On March 14, 1934, a final decree was entered by the State court dissolving the company, vacating its charter and appointing the Insurance Commissioner liquidator of the business and property of the company (R. 12, 13).

QUESTIONS PRESENTED

1. When the Attorney General of a state which has established a complete system for the incorporation, supervision, regulation and liquidation of its insurance companies, applies to a state court for an order dissolving such a company and providing for its liquidation by the insurance commissioner, as contemplated by the state's law, is the state court debarred from acting because of the pendency in a Federal court of a receivership proceeding, instituted by a shareholder not of record, prior to the state court proceeding?

2. Has a Federal court jurisdiction on the bill of a nonregistered shareholder to appoint receivers to liquidate a quasi-public corporation,—an insurance company,—when the state law provides a complete system for the organization, regulation, supervision and liquidation of such corporations, and does not per-

mit a shareholder to maintain a suit in the state courts for the appointment of any person as receiver to liquidate the affairs of such corporations, other than the state administrative official who supervises and regulates them?

3. If a Federal court has such jurisdiction, does the issuance of its order restraining all persons from interfering with the books, papers, records and assets of the insurance company preclude the state administrative officer from taking possession of and liquidating the business of the company pursuant to the decree of the state court made in consonance with state law?

ARGUMENT

SUMMARY

A member or shareholder of a quasi-public corporation,—a bank, an insurance company, or a building and loan association,—is bound by the provisions of the state law governing the organization, regulation, supervision and liquidation of such corporation.

If the state law provides for liquidation exclusively through the state supervisory official, the member or shareholder must be regarded in law as having accepted that provision as a part of his contract.

Under such circumstances the member or shareholder has no standing to maintain a bill in equity in a Federal court praying the appointment of receivers to liquidate the corporation. He cannot have a con-

troversy with the corporation on this subject; and even though he be a citizen of another state, there is no controversy between citizens of different states.

Diversity of citizenship is not of itself a controversy; and unless there is a controversy, diversity of citizenship does not confer jurisdiction on the Federal courts.

But even if jurisdiction did exist in the Federal court, it should not have attempted to exercise it in this case, even to the extent of issuing a restraining order because

1. In pursuance of the state policy of having insurance companies liquidated exclusively by the Insurance Commissioner, the Attorney General prior to the date of the restraining order, had proceeded according to state law to secure the appointment of the Insurance Commissioner as statutory liquidator of the insurance company;

2. Prior to the filing of the bill in the Federal court, the Insurance Commissioner had taken charge of the affairs of the company and was making every effort to rehabilitate it and place it in a position to resume business, pending his determination of the question whether, failing such rehabilitation, he should liquidate its affairs.

3. There was no charge of fraud, mismanagement, or improper conduct of any kind on the part of the Insurance Commissioner in supervising the company; and

4. The Federal courts, as a matter of comity, should not lend themselves to the subversion of a state's policy in the management and liquidation of quasi-public corporations upon the mere assertion of diversity of citizenship and the necessity for liquidation.

And even if the Federal court did not abuse its discretion in issuing its restraining order one day after the state court under state law had issued its order restraining the company from the further conduct of business and from disposing of its property, the Federal court should have rescinded its order following final action by the state court. To this extent, at least, the Federal court should sustain a state's policy in assuring shareholders of its quasi-public corporations, that liquidation, if it becomes necessary, will be in charge of the state's administrative officer charged with the duty of supervising, regulating, and liquidating such corporations.

Once the state court had declared the defendant company in such condition that its further transaction of business would be hazardous to its policyholders, its creditors, and the public, and had directed the Insurance Commissioner, as statutory liquidator, to take possession of the business and property of the company and liquidate its affairs, and had dissolved the corporate existence of the company, the Federal court should have rescinded its restraining order and permitted the state officer to function without any attempt at hindrance.

I.

The State Law Provides In Effect an Exclusive Method for Liquidating Insurance Companies; and These Proceedings were Instituted in Accordance with that Law.

Speaking for the Supreme Court of Pennsylvania, Mr. Justice Schaffer thus construed the State law regulating the liquidation of insurance companies (R. 30):

> "* * * Under the system of supervisory regulation over insurance companies established by the laws of Pennsylvania there cannot be a controversy in the State courts between a stockholder and an insurance company regarding the liquidation thereof. **The power to liquidate insurance companies rests solely in the Insurance Commissioner.** A citizen of Pennsylvania cannot, by bringing a bill in equity in a Pennsylvania court against a Pennsylvania insurance company, prevent the Insurance Commissioner from liquidating * * *."

The petitioner contends (Brief for Petitioner, p. 26) that the State law "does not even attempt to provide that the sole and exclusive method of winding up an insurance company shall be that prescribed by Section 502 of the Insurance Department Act of 1921."

But the Supreme Court of Pennsylvania has construed the statute against the Petitioner's contention; and, it is unnecessary to cite authorities for the proposition that this Court will accept the construction given

to the state's statutes by the state's highest appellate court.

And this construction is clearly warranted by the language of Sections 501 to 510, inclusive, of the Insurance Department Act of 1921 (Appendix, pp. 67 to 75).

There is no contention by the petitioner that the proceeding instituted in the state court and carried to completion in that court under state law was in any sense irregular or improper. The petitioner argues that because of the prior pendency of the receivership proceeding in the Federal court, the state court, having only concurrent jurisdiction, did not have any jurisdiction at all; the Attorney General's suggestion was filed after the bill in equity had been filed in the Federal court.

At this point we wish to correct a statement appearing in the restraining order of the Federal court (R. 11). The order states that previous application for the restraining order had been "continued at the request of all parties in interest, including the Deputy Attorney General of the State of Pennsylvania." There was no basis of fact for this statement. At no time has the Commonwealth, its Attorney General, or its Insurance Commissioner, or any representative or deputy acting for any of them, been a party to the Federal proceeding or to any agreement incident thereto or connected therewith.

II.

The District Court Did Not Have Jurisdiction to Appoint Receivers to Liquidate the Company.

Congress has given expression to the policy that shareholders and creditors of insurance companies shall not be subjected to the liquidation of their affairs by Federal courts at the instance of disgruntled shareholders.

Quasi-public corporations, such as insurance companies, banks, trust companies, and building and loan associations, are not subject to the bankruptcy laws (Act of April 11, 1932, c. 38, 47 Stat. 47). A district court cannot appoint receivers in bankruptcy for an insurance company and thereafer wind up its affairs. We submit that a district court may not effect the same result by means of an equity receivership proceeding.

The proceedings instituted in the Federal court by bill in equity are tantamount to bankruptcy proceedings. The bill alleged insolvency and prayed that receivers be appointed to liquidate the company, not merely continue its business.

The complainant was not seeking merely a "nursing receivership"; in effect he was seeking to institute a bankruptcy proceeding.

There is no legislative authority in a district court to appoint a receiver to liquidate a quasi-public corporation of Pennsylvania.

The Act of Congress (R. S. Sections 563, 629; 28 USCA Section 41, (1)) provides that:

> "The district courts shall have original jurisdiction as follows:
>
> "First. Of all suits of a civil nature, at common law or in equity, * * * where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3000, and * * * is between citizens of different States * * *."

Under the system established by Pennsylvania law there cannot be a justiciable controversy between a shareholder and an insurance company involving the appointment of receivers to liquidate the company. If a citizen of Pennsylvania sought by bill in equity in a Pennsylvania court to secure the appointment of receivers to liquidate a Pennsylvania insurance company, the court would appoint only the Insurance Commissioner. If it appointed another, the Insurance Commissioner could immediately succeed him. There would be no justiciable controversy to support a bill seeking the appointment of any person other than the Commissioner.

Therefore, if the district courts of the United States have jurisdiction in cases such as that now before the court, a citizen of another state would have rights superior to those of citizens of Pennsylvania.

Diversity of citizenship must, in such event, be held to create a controversy, which, but for diversity of citizenship, could not exist.

To state the matter differently, the court would not be taking jurisdiction of controversies between citizens of different states but would be creating controversies between such citizens.

For the purposes of this case, it is not necessary to determine whether receivers can ever be appointed for insurance companies. Possibly allegations of fraud or mismanagement or maladministration might warrant the appointment of receivers, but receivers cannot be appointed for such companies for the express purpose of liquidating them.

It is true that Section 507 of the Insurance Department Act of 1921 (Appendix, p. 72) recognizes the possibility that receivers may be appointed by State courts; but there is no recognition there of the right to appoint receivers **to liquidate** a company. The preceding sections of the statute make it clear that liquidation is the function of the Insurance Commissioner, exclusively. And the Supreme Court of Pennsylvania has so construed them.

In addition to the requirement that there be a controversy, the Judicial Code, as quoted, confers jurisdiction only over suits "of a civil nature, at common law or in equity." This provision has been construed as conferring jurisdiction in equity only where it can be supported by the principles of the High Court of Chancery in England, existing at the time of the adoption of our Constitution.

In Loring v. Marsh Et Al., Fed. Cas. No. 8515 (C. C., Dist. Mass., 1865) Judge Clifford said, at 15 Fed. Cas. 905, 914:

> "* * * The courts of the United States cannot exercise any equity powers, except such as are conferred by an act of congress, and those judicial powers which the high court of chancery in England under its judicial capacity, as a court of equity, possessed and exercised at the time of the formation of the constitution of the United States. * * * The supreme court hold that the prerogative power belonging to the sovereign, has not been delegated to the federal government, but remains in the several states, and is to be exercised according to the laws and usages prevailing in the several states * * *"

We have been unable to find any case in which the High Court of Chancery assumed jurisdiction to liquidate a quasi-public corporation.

That being the case, the section of the Judicial Code to which we have referred cannot be construed as conferring upon district courts jurisdiction in equity to liquidate quasi-public corporations and especially quasi-public corporations of sovereignties other than the United States Government. And there is no other Federal statute which could be construed to effect that result.

It is, of course, true that state legislation cannot limit or control the jurisdiction of the Federal courts in cases in which they have heretofore been accustomed to exercise jurisdiction. But state laws may in effect bar an individual from resort to a Federal court

by denying him a right of action against a quasi-public institution of which he is a member or shareholder. The Federal courts have recognized this distinction.

In McGarry v. Lentz, 13 F. (2d) 51 (1926), the Circuit Court of Appeals for the Sixth Circuit affirmed the District Court in its refusal to appoint receivers for an Ohio fraternal benefit society on application of several of its members. The Ohio General Code contemplated the complete regulation of domestic fraternal benefit societies and insurance companies by state officers. The court held that this precluded any member of a society organized under such laws from resorting to a Federal court for relief not contemplated by the state statute. Judge Hickenlooper said, at page 52:

> "* * * Obviously, no state Legislature can regulate, limit, or control the jurisdiction of the federal courts, nor can the laws of any state preclude resort to the federal courts, nor confer exclusive jurisdiction upon a designated state court, in a class of cases of which the federal courts of equity have theretofore been accustomed to assume jurisdiction. * * *"

But at page 53:

> "* * * While the question is sometimes loosely referred to as one involving the jurisdiction of the court over the subject-matter of the litigation, the purpose, scope, and effect of section 9487 of the General Code of Ohio, and similar provisions in other states, are those of the limitation of the rights of members and policy holders, rather than a restriction upon the jurisdiction of courts of equity.

> "In the present case the very contract, which created whatever rights the complainants may have, limited and defined those rights, so as to exclude the remedy now asserted. The question, therefore, is not whether the complainant's are by statute precluded from asserting in this court a right given them by law, but rather whether the right was ever existent. The complainants have no rights here which do not originate under and are not founded upon their contracts of membership and policies of insurance in the American Insurance Union. * * *"

Likewise, in COOK v. ILLINOIS BANKER'S LIFE ASS'N, 46 F. (2d) 782 (1931), the Circuit Court of Appeals for the Second Circuit upheld the District Court in dismissing a bill of complaint brought by five policyholders of an Illinois life insurance company on the ground that the complainants were without right under state law to maintain an action for an injunction and for the appointment of a receiver. The court held, citing MCGARRY v. LENTZ and other cases, that the laws of Illinois regulating its insurance companies "are a part of the charter of both the association and the company, and their enforcement is a property right of every member of the association and a charter right of the association. * * *. These provisions are valid limitations and safeguards, binding upon the corporation and its members, and will be enforced by the federal courts," (page 783).

See also HAYNES v. FRATERNAL AID UNION, 34 F. (2d) 305 (1929), where a similar statute was held by the District Court for Kansas to deny members of a Kansas fraternal society the right to resort to a Fed-

eral court for an injunction or the appointment of a receiver. By becoming members of the society the complainants "contracted away their rights" to such remedies.

RELF v. RUNDLE, 103 U. S. 222 (1881), has long been authority for the proposition that where an insurance company is dissolved under the laws of the state of its creation, the supervising official of the state becomes vested with all of its property and is actually the successor to the corporation itself.

The reasoning of the Court in that case is significant in the instant case. In holding that Relf, the Superintendent of the Insurance Department of Missouri, had a right to bring a suit in the courts of another state for the recovery of property belonging to the company, Mr. Chief Justice Waite said (page 225):

> "After the decree of dissolution the Life Association Company had no longer any corporate existence, and the temporary agency and receivership of Frost was ended when the property of the Corporation was transferred to Relf and he became under the law entitled to the possession.
>
> "Relf is not an officer of the Missouri state court, but the person designated by law to take the property of any dissolved life insurance corporation of that State, and hold and dispose of it in trust for the use and benefit of creditors, and other parties interested. **The law which clothed him with this trust was, in legal effect, part of the charter of the Corporation.** He was the statutory successor of the Corporation for the purpose of winding up its affairs. * * * He is an officer of the

State, and as such represents the State in its sovereignty while performing its public duties connected with the winding up of the affairs of one of its insolvent and dissolved corporations. His authority does not come from the decree of the court, but from the statute. He appeared in Louisiana not by virtue of any appointment from the court, but as the statutory successor of a corporation which the court had in a legitimate way dissolved and put out of existence. He was in fact, the Corporation itself for all the purposes of winding up its affairs.

"We are aware that, except by virtue of some statutory authority, an administrator appointed in one State cannot generally sue in another, and, that a receiver appointed by a state court has no extra-territorial power, but a corporation is the creature of legislation, and may be endowed with such powers as its creator sees fit to give. * * * Every corporation necessarily carries its charter wherever it goes, for that is the law of its existence. It may be restricted in the use of some of its powers while doing business away from its corporate home, but every person who deals with it everywhere is bound to take notice of the provisions which have been made in its charter for the management and control of its affairs both in life and after dissolution.

"By the charter of this Corporation, if a dissolution was decreed, its property passed by operation of law to the Superintendent of the Insurance Department of the State, and he was charged with the duty of winding up its affairs. **Every policy holder and creditor in Louisiana is charged with notice of this charter right which all interested in the affairs of the Corporation can insist shall be regarded.** * * *"

See also SOPTICH v. ST. JOSEPH NAT. CROATION BENEFICIARY ASS'N., 34 F. (2d) 566 (1926), where a member of a Kansas beneficiary association was held not entitled to maintain a suit against the association for its dissolution with incidental accounting and the appointment of a receiver, since by Kansas law, all power to bring and maintain suits of this character was withdrawn from members of the association and reposed in the Superintendent of Insurance and the Attorney General. District Judge Pollock said, page 568:

> "* * * I am impelled to this conclusion by the decisions of the Supreme Court of this state construing the statutes of the state under which defendant association was created and by which it is governed. * * *"

In the present case, the Commonwealth contends that the complainant in the district court, because he is a shareholder of the insurance company, and notwithstanding his residence beyond the confines of the Commonwealth, is bound by the laws under which the company was created and regulated. By the provisions of those laws the company could be liquidated only by the Insurance Commissioner.

There was no justiciable controversy brought to the district court by the bill in equity filed there.

III.

Even if Jurisdiction Existed It was An Abuse of Discretion for the Federal Court to Exercise It.

A reading of the portions of The Insurance Department Act of 1921 and of The Insurance Company Law

of 1921, quoted at pages 53 to 76 of this brief, renders it apparent that the Commonwealth of Pennsylvania has provided a complete system for the incorporation, supervision and liquidation of insurance companies.

Under Section 502 of The Department Act the Insurance Commissioner, under certain conditions, may, as statutory liquidator, take possession of the business and property of a Pennsylvania insurance company. Subsequent sections prescribe his powers and duties after he has taken possession.

In this case, although the Commissioner had not actually become liquidator of the insurance company prior to the filing of the bill of complaint in the Federal court, he had taken the steps described in our Additions to Petitioner's Statement of the Case, to safeguard the company's assets and to protect its policyholders, its creditors and the public.

Beginning on September 14, 1933, when the Commissioner definitely ascertained that its President had improperly removed assets of the company and made illegal investments for it and continuing throughout to the time when the suggestion of the Attorney General was filed in the Court of Common Pleas of Dauphin County, the Commissioner never ceased to exercise control over the company as authorized by Pennsylvania law.

There is no charge in the bill of complaint filed in the Federal court that the Commissioner was guilty

of neglect or delay in performing his duty. What he did in refraining from resort to the State court pending the hoped-for execution of plans to rehabilitate the company was beneficial to the policyholders, creditors and shareholders of the company. Rather than take immediate steps to liquidate the company,—which would have been disastrous to any plan to reestablish its financial position,—the Commissioner elected to delay the filing of his suggestion with the State court until it was definitely determined that a rehabilitation plan could not succeed. During this time the policyholders, creditors and shareholders of the company did not suffer any loss. The company was constantly under the supervision and control and subject to the directions of the Commissioner.

Under these circumstances, we submit that the district court should not have entertained a shareholder's bill designed to unseat the state officer. The court should have sustained Pennsylvania's statutory method of liquidation.

In STATE OF OHIO EX REL. BETTMAN, ATTORNEY GENERAL, v. COURT OF COMMON PLEAS OF FRANKLIN COUNTY ET AL., 178 N. E. 258 (1931), the Supreme Court of Ohio restrained by prohibition the appointment by an inferior court of a receiver for a building and loan association. The complainant, a creditor, alleged that the association was insolvent and requested the appointment of a receiver. The Attorney General of the State alleged that for some time prior to the suit the Superintendent of Building and Loan Associations of Ohio had been examining the association to ascertain

its true condition and determine the course to be pursued by him under the law, and that the sole purpose of the complainant and her counsel in filing the bill was to deprive the Superintendent of jurisdiction and procure the liquidation of the association by receivers.

The Supreme Court held that the court of common pleas had no authority to appoint a receiver and that the statutory method of dissolution and liquidation of building and loan associations was adequate, complete, and exclusive. The language of Matthias, J., at page 261, is particularly pertinent in this case. He said:

> "These facts are uncontroverted, and there being no charge of failure, neglect, or delay of the superintendent of building and loan associations, or of the attorney general, in the performance of their duties prescribed by law, the presumption, of course, obtains that they have been and will continue to be diligent in the performance of all the duties, and faithful in meeting all the responsibilities of their respective offices relative to the affairs of said company."

In the present case, the Insurance Commissioner, having a complete knowledge of the financial condition of the company and of the possibility of re-establishing its position in such manner as to assure its resumption of business without loss to any policyholder or creditor, was the proper person, in fact and in law, to determine what was for the best interests of such parties and the public.

In order to protect the policyholders, the creditors and the public and in turn the shareholders themselves

the Commissioner refrained from taking such action immediately as would completely and finally have rendered hopeless all plans to save the company.

While withholding the filing of his suggestion with the state court and acting faithfully according to the law of Pennsylvania, the Commissioner,—if the contention of the petitioner herein prevails,—was effectively and permanently precluded from liquidating the company, merely because a shareholder determined that regardless of the law of Pennsylvania under which it was organized and had functioned, he would unseat the Insurance Commissioner and substitute a Federal receiver.

And the district court, in the face of an answer denying the averments of the bill, and without a hearing, issued its restraining order, the purpose of which must have been to prevent the state administrative and judicial officers from functioning as required by state law.

The Commonwealth and its Insurance Department were helpless to prevent the nonresident shareholder from presenting his bill in equity to the Federal court, but that court should not have taken any affirmative action under the circumstances of the case. The bill ought to have been dismissed.

The Federal court should not have issued its restraining order in the face of the fact that the Court of Common Pleas of Dauphin County had taken juris-

diction and proceeded under Pennsylvania law as interpreted and upheld by the highest court of the state.

The question is: Should a Federal court even if it has jurisdiction, ignore the public policy of a state merely because there is a diversity of citizenship and the sum of three thousand dollars ($3,000) is involved?

There is abundant support for a negative answer.

The complainant in the Federal court asked for the appointment of receivers to liquidate the company. While the court did not appoint receivers it acted to the extent of trying to interfere with the liquidation of the company as contemplated by the state's system of handling insurance companies. By its restraining order it sought to oust the state administrative officer from the performance of his statutory functions and to oust the state court from its jurisdiction and power to dissolve the corporate existence of the company and to liquidate its affairs as prescribed by state law.

In so doing the court abused its power.

The possession of jurisdiction is not the same thing as its exercise.

As Section 7669 of FLETCHER'S CYCLOPEDIA OF CORPORATIONS expresses it:

> "The distinction between 'jurisdiction' to appoint a receiver and whether the power, if it exists, shall be exercised, must always be kept in mind. Jurisdiction of a court of equity to appoint a receiver is one thing, and whether the

court will exercise its jurisdiction is an entirely different matter. While courts hesitate to appoint a receiver, especially when the corporation is solvent, this does not mean that there is want of jurisdiction to appoint a receiver, it being well said that 'judicial hesitancy does not mean judicial atrophy or paralysis.'"

And, again in Section 7697:

"* * * The power of appointment [of receivers] is a delicate one, and to be exercised with great circumspection. Indeed, the courts have held repeatedly that **the power to appoint a receiver should be exercised with great care and the utmost caution and only in case of an emergency** * * * or * * * 'extreme necessity,' * * * and more especially is this true where the corporation is solvent, or the defendant corporation is a bank. * * * 'A receivership is not a panacea for all business ills. The remedy may be worse than the disease.' * * * 'A receivership is the most drastic remedy and the most expensive luxury known to the realm of the law.' * * *" Citing FURRER v. NEBRASKA BUILDING AND INVESTMENT COMPANY, 189 N. W. 359 [Neb.]

This language applies with particular force to insurance companies. This is especially so in view of the fact that the legislatures of many states have enacted laws giving to statutory officers rather than to the courts, the duty to liquidate these companies. The legislatures evidently had in mind the avoidance of the well-known abuses which have become so costly to creditors and stockholders in receiverships of ordinary corporations.

In his Article on "THE ABUSES OF RECEIVERSHIPS," in XIX Yale Law Journal 275 (1910), Judge Jacob Trieber of the United States District Court in Arkansas, said:

> "The appointment of a receiver and the granting of a temporary injunction, like the granting of specific performance of contracts, is not a matter of absolute right, but is within the sound discretion of the court, guided by the established principles, rules and practices in equity. One of the well established rules is that courts of equity will not grant any interlocutory relief if the injury caused the defendants by reason thereof will prove very great, while the benefits to the party applying therefor will be but small compared with the injury inflicted upon the defendant. Still, in spite of these well settled equitable principles, it is not unusual for appointments of receivers to be made upon the most flimsy allegations, and sometimes even without notice to the parties directly affected thereby. * * *"

Experience shows this to be true.

There is a real and extensive public interest involved in the state supervision and regulation of insurance companies, banks, and building and loan associations. Judges should hesitate a long while before applying to such institutions the extraordinary remedy of receivership.

In ULMER v. FALMOUTH, 93 Me. 302, 45 A. 32 (1899), the Supreme Court of Maine said (page 34):

> "'It is to be observed that these institutions possess a public character, and it is for the in-

terest of the public, not only that they shall be subjected to judicial investigation when they ought to be, but also that they shall not be so subjected when they ought not to be. Unusual means are placed in the hands of the bank examiner to ascertain their condition, and it cannot be presumed that he will fail to act in a proper case. If one shareholder may maintain a bill, so may every other. There is no limit. To subject loan and building associations to vexatious, harassing and expensive litigation caused by the suits of possibly multitudinous shareholders who may be dissatisfied, with or without reason, would greatly impair their usefulness, if not imperil their existence.'"

This language is equally appropriate in considering the extent to which private litigants should be allowed to interfere with the operation of insurance companies.

The courts should not willingly exercise power to interfere with a state system of insurance control.

In BANK OF BAY BISCAYNE ET AL., V. HANKINS ET AL., 42 Fed. (2d) 209, (C. C. A. 5th Cir. 1930), the District Court appointed a receiver to control the assets of an insolvent state bank, in place of the state comptroller of Florida acting under statutory authority. The appellate court reversed the district court's action. It remanded the case, with directions to dismiss the bill of complaint, "The mandate to issue immediately."

The court said, at page 210:

"Regardless of the terms used, it is apparent that the order in effect appoints a receiver to control the assets of the failed bank, and enjoins the

> comptroller from carrying on the liquidation of the institution under provisions of the laws of Florida. **A bank organized under the laws of a state is a quasi-public institution, and, whenever the laws of the state provide for supervision and control of the affiairs of the bank by an authorized official, and also for the ultimate liquidation and distribution of its assets under his direction, in the event of its insolvency, it is a matter of grave consequence for any court to interfere,** and that should be done only in a perfectly clear case. It does not appear from the record that such a case is presented here. The laws of Florida provide an orderly method of liquidating the affairs of an insolvent state bank, in substantially the same manner that federal statutes provide for the liquidation of an insolvent national bank. * * * It is usually a matter of discretion to issue an injunction and appoint a receiver, but the exercise of jurisdiction and the entering of the order appealed from in this case appear to us to be unwarranted."

This language also is equally apt when an insurance company, instead of a bank, is involved.

In STREET'S FEDERAL EQUITY PRACTICE, Vol. 3, Section 2528, it is said:

> "* * * the right of a federal court to appoint a receiver may sometimes be materially affected by state statutes. For instance, if a state statute creates a substantive right to have a receiver appointed, a federal court will not appoint a receiver, though upon the general principles governing its own practice a receiver would be appointed."

Not only does the Pennsylvania statute provide that

the Insurance Commissioner shall have the sole power to liquidate insurance companies, but it also gives to policyholders, creditors and shareholders a positive right to have the Insurance Commissioner substituted if a receiver should be appointed by a state court. This right should, we submit, be recognized by the Federal courts as a matter of comity.

The right conferred by the Pennsylvania law is not merely for the benefit of the policyholders, creditors and shareholders of the particular company. It is intended to benefit the people of the Commonwealth generally. It is a matter of real public importance that the affairs of insurance companies be liquidated,—when liquidation becomes necessary,—in an orderly and economical manner. And those who deal with such corporations have a right to rely upon the sanctity of the law creating and regulating them.

In MITCHELL v. LAY ET AL., 48 Fed. (2d) 79 (1930), it was held that the Insurance Commissioner of California could not be ordered by a Federal court to deliver over to its receiver funds placed in the custody of the state for the protection of the insolvent insurance company's creditors therein. The District Court judge had issued such an order, but on appeal he was reversed.

Judge Wilbur said at page 84:

> "It will be observed that this injunction prohibits the insurance commissioner from performing the duties imposed upon him by a state statute * * * which provide for the liquidation of insolvent insurance companies which have been engaged in

> business in the state of California. The constitutionality of this state statute is not disputed. The order appealed from directs that the appellant insurance commissioner violate his official duty under such statute by turning over to the receiver of the federal court a fund that was in the custody of the state through its officers for the protection of creditors of the insolvent insurance company before this action was begun. And these orders are made notwithstanding that there is no claim that the insurance commissioner has neglected his duty, but solely on the ground that he is endeavoring to perform his duty as defined in the state statute. The mere statement of this situation is sufficient to show the impropriety of the order of the court. * * *"

A petition for writ of certiorari to the Supreme Court of the United States was denied. (283 U. S. 864, 75 L. Ed. 1469 [1931]).

In AMOS, COMPTROLLER OF STATE OF FLORIDA v. TRUST COMPANY OF FLORIDA ET AL., 54 Fed. (2d) 286 (C. C. A. 5th Cir. 1931), the District Court attempted to take over a large part of a trust company's assets by a special receivership. It enjoined the state comptroller from exercising the functions imposed upon him by state law. The appellate court held such action by a District Court improper and unwarranted. The state administrative officer was compared to a liquidator appointed under the national banking act and was held to be not a court officer, but a representative of the state.

In his decision, Circuit Judge Sibley followed the decisions of the Florida courts in STATE OF FLORIDA

EX REL. DADE COUNTY SECURITY CO. v. BARNS, 128 So. 860 (1930); BANK OF BAY BISCAYNE v. HANKINS, supra; and STATE OF FLORIDA v. CIRCUIT COURT, 135 So. 866 (1931).

A petition for a writ of certiorari was denied by this Court (285 U. S. 559, 76 L. Ed. 947 [1932]).

This Court appears to have set its seal of approval on the policy of non- interference by equity courts with state systems of supervision, control and liquidation of quasi- public institutions.

Before closing our argument on this point, we feel that we should call the Court's attention to PORT NEWARK NAT. BANK OF NEWARK v. WALDRON, 46 Fed. (2d) 296 (C. C. A. 3rd Cir. 1930). In that case a district court appointed a receiver to take charge of the affairs of a national bank. The receiver appointed by the Comptroller of the Currency under the provisions of the United States statutes appealed from the decree making this appointment.

The Comptroller of the Currency holds a position with respect to national banks similar to that held by the Secretary of Banking with respect to Pennsylvania banks, trust companies and building and loan associations, and by the Insurance Commissioner to Pennsylvania insurance companies. In the PORT NEWARK CASE the Comptroller had been supervising the institution with a view to liquidation and was conferring with the bank's officers on a plan that might make such course unnecessary. On the very day of the con-

ference a stockholder presented to the district court a bill praying for a receivership. The court granted a rule to show cause why receivers should not be appointed. The following morning the Comptroller appointed a liquidator under the authority of the Revised Statutes of the United States (12 U. S. C. A. Section 191), providing that "Whenever the comptroller shall become satisfied of the insolvency of a national banking association, he may, after due examination of its affairs * * * appoint a receiver who shall proceed to close up such association."

The Circuit Court of Appeals held that (page 279):

> "* * * the authorities are clear that the appointment of receivers by the Comptroller is part of a complete federal system looking to the control of national banks, and that such receivers are not like a receiver appointed by a court, but are officers of the United States, and their possession of the bank is the possession of the United States. * * *"

The similarity of the situation to that of the case at bar is striking. The Insurance Commissioner is not like a receiver appointed by a court, although he is given by statute the powers of such a receiver. He holds and exercises those powers by virtue of his statutory office. Possession by him of an insurance company pursuant to an order of the state court in conformity with the state statue is possession by the Commonwealth of Pennsylvania.

Judge Buffington's language at page 298 of the PORT NEWARK CASE, states our situation precisely:

> "We pass over the omission to give notice to the bank of the filing of the bill and the application

for a receiver; of the failure to give bond either when the injunction ex parte restraining order of August 7th was entered, or, indeed, when the final injunction order of August 13th was made; of the effect of the filing of the bill in precipitating the closing of the bank and making impossible of performance the acceptance of Mr. Rippel's offer on behalf of the Merchants' & Newark Trust Company of taking over the bank and preventing its closing; and confine ourselves solely to the question whether the Comptroller's receiver was lawfully ousted from his possession. We are of opinion he was not. **This is not a conflict between two courts of co-ordinate jurisdiction, but is one between the judicial and the executive arm of the sovereignty.** In our view, the threatening status of this bank on August 7th and its efforts to prevent its failure necessitated the supervision and 'dominion' of the Comptroller, and, when that duty was begun by the bank examiner, the Comptroller had 'dominion' over the bank's affairs, and so continued until the efforts to prevent closing the bank were defeated by the filing of this bill. When this happened, it became the duty of the Comptroller, who, as his order stated, 'had information on file in this bureau that the bank is insolvent,' to appoint a receiver and close the bank. The wisdom of his so doing prevented a run and a depletion of the bank's assets. For it will be observed that the court's order of August 7th was not to close the bank, but to except from its order 'the ordinary course of business of the bank'—a situation that would have precipitated a run upon it and a depletion of its assets from August 7th until August 13th, when the court's order appointing a receiver was entered. * * *"

Then KORLBY v. SPRINGFIELD INST. FOR SAVINGS, 245

U. S. 330, 62 L. Ed. 326 (1917) was cited. There the Supreme Court speaking through Mr. Justice Clarke said (page 333):

> "From the earliest days of the administration of the National Banking Act to this case attempts have been made in many forms to give to it a technical construction which would so restrict the powers of the Comptroller as to greatly delay and impede the settlement of the affairs of insolvent banks. But this court has uniformly declined to narrow the act by construction, and has placed a liberal interpretation upon its provisions to promote its plain purpose of expeditiously and justly winding up the affairs and paying the debts of such unfortunate institutions. * * *"

Judge Buffington continued in the PORT NEWARK NATIONAL BANK CASE (page 299):

> "* * * Sufficient to say that in the present case we regard the Comptroller at the time this bill was filed as having complete dominion over, and, by his bank examiner, full legal control of, the then and future operations of the bank, and that such situation might ultimately require the appointment of a receiver. Consequently, the court below, when the bill was filed, acquired no jurisdiction to shear the Comptroller of the statutory power to take the further step of appointing a receiver in case insolvency existed and the attempted sale fell through. As the order states the comptroller had on file at that time information of the insolvency of the bank, it is clear he had already complied with the statutory provisions of 'on examination of its affairs,' after which he 'may appoint a receiver.' "

In the instant case, the Insurance Commissioner had complete dominion over the affairs of Penn General Casualty Company at the time the complainant's bill was filed in the Federal court. We do not say that the Court of Common Pleas of Dauphin County had jurisdiction at that time. Nor do we say that such jurisdiction as it obtained upon the filing of the suggestion by the Attorney General dated back to a time prior to the filing of the bill of complaint. We do say that the Insurance Commissioner, having exercised dominion over the company long prior to the application to the district court, had jurisdiction as a statutory officer, with which the district court should not have interfered.

Counsel for the petitioner treat this case as if it involved a dispute between two courts. Because the bill in equity was filed on November 17, 1933 and it was not until December 8, 1933 that the Attorney General proceeded in the state court, they argue that the Federal court first took jurisdiction, and merely because of that fact should continue to hold it.

From our standpoint it is immaterial whether the district court obtained jurisdiction before the state court, granting for the moment that the district court had jurisdiction.

The question is much more far-reaching than that.

We are urging that even if the district court technically had jurisdiction, it ought not to have exercised it, even to the extent of issuing a restraining order.

But in any event it is clear that the district court technically would be obliged to rely upon the establishment of facts averred by the complainant but denied by the respondent, to justify it in appointing receivers or at least in making them permanent. Actually there was no hearing and no evidence before the court upon which it could base the appointment of receivers. And so the court went no farther than to issue its restraining order; but even this was calculated to paralyze the functioning of the state administrative and judicial officers as required by state law.

Using language equally as forceful as that which we have quoted from Federal appellate court decisions, the state courts have repeatedly upheld the systems established by state law for the supervision and liquidation of insurance companies, banks and building and loan associations.

The highest courts of several states have used the writ of prohibition or equivalent remedy to halt any effort of a court of first instance to usurp the powers reserved by statute to administrative officers in such cases.

ABBOTT, COM. OF BANKING, v. MORRIS, JUDGE, 132 S. E. 372 (S. C. A. W. Va. 1926).

GREEN, SUPERINTENDENT OF BANKS, v. SMITH ET AL., 129 So. 92 (S. Ct. Fla., 1930).

STATE OF FLORIDA EX REL. DADE COUNTY SECURITY CO. ET AL. v. BARNS ET AL., 128 So. 860 (S. Ct. Fla., 1930).

STATE OF FLORIDA EX REL. LANDIS, ATTY. GEN. v. CIRCUIT FOR ELEVENTH JUDICIAL CIRCUIT ET AL., 135 So. 866 (S. Ct. Fla., 1931).

STATE OF FLORIDA EX REL. PORTER ET AL. v. ATKINSON, CIRCUIT JUDGE, ET AL., 146 So. 581 (S. Ct. Fla., 1933).

STATE OF MISSOURI EX REL. MISSOURI STATE LIFE INS. CO. v. HALL, JUDGE, ET AL., 52 S. W. (2d) 174 (S. Ct. Mo., 1932).

STATE OF OHIO EX REL. BETTMAN v. COURT OF COMMON PLEAS OF FRANKLIN COUNTY, 178 N. E. 258 (S. Ct. Ohio, 1931).

UNION SAVINGS AND INVESTMENT CO. v. DISTRICT COURT OF SALT LAKE COUNTY, 140 Pac. 221 (S. Ct. Utah, 1914).

Comity between the Federal and state governments demands that the Federal authorities do their utmost to effectuate state policy in matters involving these quasi-public corporations.

And generally speaking this has been the attitude of those circuit courts of appeal which have had an opportunity to express themselves upon a question such as the one here presented.

In LYON v. MCKEEFREY, 171 Fed. 384 (C. C. A. 3rd Cir. 1909), a nonresident creditor of a Pennsylvania bank secured the appointment of Federal receivers, who carried on liquidation to the point where creditors were paid. The state banking official sought an

order on the receivers to turn over the balance of the assets to him. The district court refused such order, but the circuit court of appeals reversed the court below. It held that the state system for the government of banking institutions and insurance companies is such that a Federal court should not interfere with it.

In the course of his opinion, Judge Gray said (page 392):

> "The defendant corporation was a creature of the laws of Pennsylvania, and by those laws the rules governing its existence were prescribed. The measure of control to be exercised over its own corporations was determinable by the law and policy of the state to which they owed their being. By the legislation here in question, the state of Pennsylvania has seen fit to subject such corporations to supervision and administrative control and has ordained the proceedings, partly administrative and partly judicial, by which the life of such corporations may be determined and their affairs wound up and liquidated. The judicial proceeding is not one that may be instituted by private parties, but by the Attorney General of the state, acting on behalf of the commonwealth and in the interest of the public. Such a proceeding is not one of which a United States court can have concurrent jurisdiction. It does not involve a controversy between private parties, whether citizens of the same state or of different states."

In principle, there is absolutely no difference between a case involving a bank or a building and loan association and a case involving an insurance company.

In O'NEIL v. WELCH, 245 Fed. 261 (C. C. A. 3rd Cir. 1917), the court had for consideration Pennsylvania's right to administer the affairs of its insurance companies through the Insurance Commissioner. The Commissioner, through the Attorney General, proceeded in a state court under the state's statute against Union Casualty Insurance Company of Pennsylvania. Thereafter, a nonresident stockholder filed a bill in the district court alleging insolvency and asking for the appointment of a receiver. The defendant company filed a consent answer. One day before the proceeding in the state court came to a head, the district court appointed a receiver. The Attorney General thereupon filed a petition in that court to vacate the appointment. The district court dismissed the petition but on appeal was reversed.

The petitioner in the case at bar takes comfort in certain language used by Judge Woolley, indicating that the jurisdiction of the state court was sustained because that court had acted first. But the Federal court did recognize the rule that state systems of control over quasi-public institutions must be respected. At page 267 Judge Woolley said:

> "The state engaged in this undertaking primarily for the protection of the public. Being for the public, its action is a governmental function. When in its exercise it becomes necessary to protect the public from insolvent or improperly conducted insurance companies, the state pursues a remedy prescribed by the same law that conferred the corporation's rights and defined the state's duties. Given briefly, the Insurance Commissioner, acting through the Attorney General,

files in a State court a suggestion of the corporation's insolvency or unlawful conduct. In this way the State acts and in this way the State begins suit. Upon the State's suggestion the court starts a judicial inquiry by directing to the Insurance Company a rule to show cause why the Insurance Commissioner should not take possession of its property, **and at the same time** (that is at the very beginning of the suit) the court, if it wishes, lays its hand upon the company's property, and by a restraining order holds it within its control pending the inquiry.

"The jurisdiction of the State court thus invoked is a special jurisdiction conferred by statute as a part of the State's policy of insurance regulation and control. It is not conferred for the protection of corporations' policyholders and creditors alone, but for the protection of the public as well. This clearly appears by the terms of the act; it again appears in the court's degree. In prosecuting an insurance company the State is acting for the public, and the public is in turn interested in the proceedings; though not nominally present as a party, it is nevertheless present in the person of the Attorney General."

And Judge Woolley said, at page 268:

"* * * As against stockholders, the law is equally effective. **The law under which an insurance company is incorporated subjects it to State supervision and administrative control, and ordains the proceeding by which its life may be determined and its affairs wound up and liquidated. The rights of such a corporation are therefore subordinate to the rights of the State, and the rights of stockholders are no greater than those of the corpora-**

> **tion.** When, therefore, the statutory proceeding has been begun in a State court and by its commencement jurisdiction has been acquired over the corporation, neither the corporation nor its stockholders, nor its creditors can divest the court of its jurisdiction or deprive the State of its public function by subsequently invoking the aid of a Federal court to remove the corporation's property beyond the reach of the State court and thereby withdraw from the State court the subject matter of the action there pending. If this were not so, every action instituted by the state government against an insurance company might be interrupted and defeated by a non-resident stockholder filing in a Federal court a bill accompanied with the answer of an acquiescing corporation, after action has been begun in the State court and before in its orderly progress the property of the corporation has been physically seized. Thus the policy of the State would be thwarted and its administration overthrown; the State's creature would be more powerful than the State itself. We are satisfied that no such thing was contemplated either in Federal or State policy."

And in MITCHELL v. LAY, 48 F. (2d) 79 (1930), the Circuit Court of Appeals, Ninth Circuit, reversed an order requiring the Insurance Commissioner of California to turn over to a Federal receiver funds of an insolvent insurance company which were in his possession. We have already quoted the language of Judge Wilbur, supra, page 29.

In LILLARD v. LONERGAN, 72 F. (2d) 865 (1934), the Attorney General of Kansas instituted quo warranto proceedings against The Wheat Farming Company for acting beyond its charter powers. The state court

held that while a forfeiture of the charter was justifiable, it would for the present decree only that within a reasonable time the corporation discontinue its illegal activities and dispose of assets not needed for its lawful purposes. The court further decreed that if it should prove impossible for the corporation to limit its activities in this manner, it should then be liquidated and be dissolved. The court went on to say that if these orders were not complied with "the writ of ouster will issue and such further orders as may be necessary and expedient will be made." Thereafter creditors of the company successfully resorted to a Federal court for the appointment of receivers. Thereupon the state court appointed receivers to liquidate the business of the corporation and to dissolve its affairs. These receivers and the Attorney General of Kansas then petitioned the district court to discharge the receivers it had appointed and order them to deliver all of the property of the company to the receivers appointed by the state court. The district court denied the petition. Upon appeal, the Circuit Court of Appeals for the Tenth Circuit reversed the lower court, vacating its decree and directing its receivers to deliver all property in their hands as such receivers to the receivers subsequently appointed by the state court. Judge Lewis said at page 871:

> "The rule as between courts having concurrent jurisdiction over parties and subject matter, when a controversy arises as to which has the better right to possession, has no application here. The proceeding instituted in the state Supreme Court could not have been maintained in the Federal Court, nor the one in the Federal Court in the state Supreme Court. The one in the Federal

> Court was antagonistic to the one in the state court. The bill there sought to stay the hand of the state court, to nullify its probable action and thwart the purpose of the proceeding in that court. * * *"

(Certiorari refused November 12, 1934).

That is the precise case here, except that in the instant case and under the Pennsylvania law applicable an administrative official, and not a court upon the instance of an administrative official, had taken the intermediate action looking to the possible eventual liquidation of the corporation. Here the Insurance Commissioner acted to conserve the company's assets and later through the Attorney General instituted the court proceeding giving him possession of the company's assets for liquidation.

And as in LILLARD v. LONERGAN, the state court, upon the instance of the Attorney General, followed the policy established by state law with respect to the dissolution of a state corporation and its liquidation.

The Federal court should not have attempted to interfere with the administrative and judicial processes established by state law for the dissolution and liquidation of a Pennsylvania insurance company.

It is true that there was no court proceeding prior to that instituted in the district court. Nevertheless, the procedure before the Insurance Commissioner and the Attorney General ultimately leading to a court proceeding has the same character.

The higher Federal courts themselves have sustained the contention of the states and their administrative officials that where a system has been established by the state law for the creation, regulation, supervision and liquidation of insurance companies and banking institutions, that system will not be upset on the application of an individual stockholder or creditor for a Federal receiver.

In harmony with the decisions cited, this court should affirm the judgment of the Supreme Court of Pennsylvania.

IV.

Cases Cited by the Petitioner.

The petitioner in its brief cites a number of cases in support of its contentions in this case.

Certain of these cases have no bearing whatsoever on the issues involved in this case.

In MORRILL v. AMERICAN RESERVE BOND CO., 151 Fed. 305, 313 (1907), Judge Sanborn said, at page 307:

> "* * * The Attorney General [of Missouri] and * * * his associates, speaking for the three officers of the state, say that, as this court has jurisdiction of the subject-matter and of the parties to this suit, they prefer to bring this property to, and and place it in the hands of, this court * * *."

This case did not involve the question whether receivers could be appointed by a Federal court to liqui-

date a quasi-public corporation. If the case had involved this question, it would not have been comparable to the situation in the case at bar because the state statutes of Missouri provided for the liquidation of bonding companies by receivers appointed by state courts.

LEADVILLE COAL CO. v. MCCREERY, 141 U. S. 475, 478 (1891), involved the property of a commercial corporation in the possession of a Federal court receiver at the time dissolution proceedings against the company were instituted in a state court. The Supreme Court upheld the right of the receiver to deal with the assets without regard to the proceedings in the state court.

MITCHELL v. MAURER, 69 F. (2nd) 233 (C. C. A. 9, 1934), involved the attempt by a district court to oust control of California assets of a Delaware insurance company from the California Superintendent of Insurance. The Federal court a few minutes before the state official commenced proceedings in the state court entertained jurisdiction of a bill in equity and appointed receivers. The Circuit Court of Appeals for the Ninth Circuit, contrary to the decisions of other circuit courts, sustained the action of the district court. On appeal to this court this affirmance was reversed (December 3, 1934, U. S. Law Week, Vol. 2, No. 14, 278). This court found that the district court did not have jurisdiction because diversity of citizenship did not exist.

In this case, counsel for the Superintendent of Insurance did not argue before this Court that there is a fundamental distinction between cases involving ordi-

nary corporations, and cases involving quasi-public corporations. And this Court did not discuss the case from that angle.

ELSON v. MORTAGE BLDG. & LOAN ASS'N., 4 F. Supp. 779 (D. C. Pa. 1933), on appeal in the Circuit Court of Appeals for the Third Circuit as COMMONWEALTH OF PENNSYLVANIA v. JOHN G. WILLIAMS ET AL., 72 F. (2d) 509 (1934) is now before this court on writ of certiorari.

O'NEIL v. WELCH, 245 Fed. 261, 265 (1917) we have already discussed, ante pages 39 to 41.

The following cases cited by petitioner involve the appointment by Federal courts of receivers for building and loan associations:

TOWLE v. AMERICAN BLDG. LOAN & INV. SOC., 60 Fed. 131 (C. C. N. D. Ill. 1894).

ALEXANDER v. SOUTHERN HOME BUILDING & LOAN ASS'N., 110 Fed. 267 (C. C. N. D. Ga. 1900).

SOLOMONS v. AMERICAN BUILDING & LOAN ASS'N., 116 Fed. 676 (C. C. N. D. Ga. 1902).

FLINN v. INTERSTATE BUILDING & LOAN ASS'N., 141 Fed. 672 (C. C. D. S. C. 1905).

WILSON v. PARVIN, 119 Fed. 652 (C. C. A. 6, 1903).

UNIVERSAL SAVINGS & TRUST CO. v. STONEBURNER, 113 Fed. 251 (C. C. A. 4, 1902).

It will be noted that the latest of these cases was decided in 1905. That was long before the states had adopted the policy of establishing a system for the organization, supervision, regulation and liquidation of building and loan associations and other quasi-public corporations.

For example in Pennsylvania the Banking Commissioner was for the first time given exclusive power to liquidate building and loan associations by the Act of May 21, 1919, P. L. 209.

In none of these cases was the question considered whether the Federal courts would appoint receivers to liquidate **quasi-public corporations** contrary to the policy of State law providing an exclusive method for this purpose.

With one or two exceptions, to which we later make reference, all the other cases cited by the petitioner, particularly on pages 12 to 15 inclusive of its brief, involve receivership proceedings instituted against ordinary commercial corporations or utility companies for none of which did the state statutes provide a complete and exclusive system of liquidation by a state official.

STRAINE v. BRADFORD SAVINGS BANK & TRUST CO., 88 Fed. 571 was decided in 1898. The decision was on a plea to a bill to compel a set-off of claims of the complainant against claims of a bank which was in the hands of a State receiver.

The court stated that:

> "An institution of this kind may be proceeded against in this way [receivership proceedings in State court] for other causes than insolvency. V. S. §4054. Whether this proceeding is because of insolvency * * * is not set forth in the plea. * * *"

As an authority on the point here involved this case is scarcely worth citing.

FARRELL v. STODDARD, 1 F. (2) 802 (1924) arose in a bill in equity by a person claiming that certain assets in the hands of the Insurance Commissioner of New York, were impressed with a trust. The plaintiff was neither a policy holder nor a creditor of the defunct insurance company. Obviously, the case is readily distinguishable from that now before this Court.

And in SOUTHERN TRUST CO., v. AUSTIN, 30 F. (2) 893 (1929), the trust company involved was organized under the laws of Oklahoma, which apparently did not provide a system of supervision, regulation and liquidation of such companies. At least, the Court's opinion makes no mention of such a system, and the facts of the case indicate that there could not have been such a system. The trust company had turned its affairs over to a Texas land mortgage corporation "to be managed," and was thereafter inactive.

This case cannot be regarded as a precedent relevant to the present argument.

CONCLUSION

The cases of COMMONWEALTH v. JOHN G. WILLIAMS, ET AL., October Term 1934, No. 394, GORDON, SECRETARY OF BANKING v. OMINSKY ET AL., October Term 1934, No. 395, GORDON, SECRETARY OF BANKING v. WASHINGTON, ET AL., October Term 1934, No. 549, and GORDON, SECRETARY OF BANKING v. O'BRIEN, ET AL., October Term 1934, No. 550, are the only decisions of United States Circuit Courts of Appeals refusing to give effect to state laws governing the method of liquidating quasi-public corporations. All of these cases were decided at about the same time. In the two last mentioned, petitions for certiorari to this court are pending. They involve the appointment of receivers to take out of the hands of the Secretary of Banking of Pennsylvania assets of a closed bank.

These decisions reflect a complete change in the attitude of the Circuit Court of Appeals of the Third Circuit on this important subject. In the earlier cases, LYON v. MCKEEFREY, 171 Fed. 384 (1909) and O'NEIL v. WELCH, 245 Fed. 261 (1917), this same court gave strong expression to its belief that Federal Courts should support state systems for the organization, regulation, supervision and liquidation of quasi-public corporations. One case dealt with a bank; the other with an insurance company.

In the following cases, stockholders of quasi-public corporations were held to have no standing to seek relief in a Federal Court, contrary to the provisions of the state law under which the corporations were organized:

MCGARRY v. LENTZ, 13 F. (2d) 51 (1926) C. C. A., Sixth Circuit.

COOK v. ILLINOIS BANKERS' LIFE ASS'N., 46 F. (2d) 782 (1931), C. C. A., Seventh Circuit.

In the following cases, circuit courts of appeal reviewed the exercise of discretion by district courts in appointing receivers for quasi-public corporations or for certain assets of such corporations, and upheld the state authorities in their objection of such receiverships:

MITCHELL v. LAY, 48 F. (2d) 79 (1930), C. C. A., Ninth Circuit. Petition for Certiorari to U. S. Supreme Court denied. 283 U. S. 864 (1931).

BANK OF BAY BISCAYNE v. HANKINS, 42 F. (2d) 209 (1930), C. C. A., Fifth Circuit.

AMOS v. TRUST CO. OF FLORIDA, 54 F. (2d) 286 (1931), C. C. A., Fifth Circuit. Petition for Certiorari to U. S. Supreme Court denied. 285 U. S. 559 (1932).

In the following cases receiverships were set aside even though the bill in equity had been filed before the state officer took possession of the quasi-public corporation's property and assets:

AMOS v. TRUST CO. OF FLORIDA, 54 F. (2d) 286 (1931), C. C. A., Fifth Circuit. Certiorari refused. 285 U. S. 559.

MITCHELL v. LAY, 48 F. (2d) 79 (1930), C. C. A., Ninth Circuit. Certiorari refused. 283 U. S. 864.

In the following cases Federal receivers were required to turn over to the state authorities the assets

of a quasi-public corporation at the instance of the proper state officer. In all of them the district court was reversed:

LYON v. MCKEEFREY, 171 Fed. 384 (1909), C. C. A., Third Circuit, Judge Gray.

MITCHELL v. LAY, 48 F. (2d) 79 (1930), C. C. A., Ninth Circuit. Certiorari refused. 283 U. S. 864.

O'NEIL v. WELCH, 245 Fed. 261 (1917), C. C. A., Third Circuit.

LEE v. EDMUNDS, 66 F. (2d) 122 (1933), C. C. A., Fifth Circuit.

However, in the two cases last cited the Federal receivership was junior to a state receivership.

Thus we find support for our position in the expressions of the Circuit Courts of Appeal of the Second, Third, Fifth, Sixth and Ninth Circuits.

On principle, we submit that the decree of the Supreme Court of Pennsylvania in the present case should be affirmed.

The complainant in the district court is a stockholder of Penn General Casualty Company. He is bound by the laws of Pennsylvania establishing the state's system for the supervision, regulation and liquidation of such companies. He could not have a justiciable controversy with the company regarding its liquidation.

But if such a controversy could exist and diversity of citizenship gave the district court jurisdiction, that court abused its discretion in attempting to interfere when the Insurance Commissioner had actually taken jurisdiction over the company, exercised dominion over its affairs and then later followed the process of liquidation prescribed by state law. The Federal courts should not, in such cases, lend their aid to efforts to frustrate the state's settled policy in regulating and liquidating its quasi-public corporations.

For these reasons we believe that the decree of the court below should be affirmed.

Respectfully submitted,

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APPENDIX

EXCERPTS FROM PENNSYLVANIA ACTS OF ASSEMBLY

The Administrative Code of 1929 (Act of April 9, 1929, P. L. 177, 71 PS Secs. 411, 412).

Section 1501. Powers and Duties in General.—The Insurance Department shall, subject to any inconsistent provisions in this act contained, continue to exercise the powers and perform the duties by law vested in and imposed upon the said department, and the Insurance Commissioner.

Section 1502. Insurance.—The Insurance Department is charged with the execution of the laws of this Commonwealth in relation to insurance.

The Insurance Company Law of 1921 (Act of May 17, 1921, P. L. 682, as amended by the Act of March 10, 1925, P. L. 30, 40 PS Sec. 341, et seq.)

Section 101. Certain Words Defined.—The word "company," as used in this act, shall be construed to include incorporated insurance companies only, whether incorporated under the laws of this Commonwealth, or of any other State, Territory, or district, or under the laws of any foreign country.

Except as used in connection with employers' mutual liability insurance associations, or whether clearly used in its general sense, the word "association," as used in this act, shall be construed to include only individuals, partnerships, or associations of individuals,

authorized to engage in the business of insurance in the Commonwealth as insurers on the Lloyds plan.

The word "exchange," as used in this act, shall be construed to include only individuals, partnerships, and corporations, authorized by the laws of the Commonwealth to exchange with each other inter-insurance or reciprocal insurance contracts.

Wherever used in this act, unless a contrary intention is evident from the context, the singular shall include the plural, and the masculine shall include the feminine and neuter.

Section 102. Short Title.—This act shall be known and may be cited as "The Insurance Company Law of 1921."

Section 107. Individuals, Associations, and Partnerships Prohibited from Doing Insurance Business.—Except as herein provided, the doing of any insurance business in this Commonwealth, as prescribed in this act, for insurance companies, by any private individual, association, or partnership, is prohibited. Any person who solicits or obtains, within this Commonwealth, applications for insurance by any such private individual, association, or partnership, contrary to the provisions of this act, shall be liable to a penalty of one hundred dollars ($100.00), for the use of the Commonwealth, for every application obtained, to be sued for and recovered by the Attorney General or district attorney of the proper county, either by action of debt or criminal prosecution. Any person who has paid to any agent of such unauthorized individual, association, or partnership any premium moneys for insurance

granted or to be granted shall be entitled to recover the same by an action at law from such agent or from the person, association, or partnership for which he acted. This section does not prohibit the doing of insurance business by associations known as Lloyds, nor the exchange of inter-insurance or reciprocal contracts of insurance authorized by this act, nor shall the same prevent any one from becoming and being accepted as personal surety or guarantor.

Section 201. Classes of Insurance Companies.—Subject to the provisions of this act, insurance companies of any of the following classes may be incorporated: (a) Stock Life Insurance Companies; (b) Mutual Life Insurance Companies; (c) Stock Fire, Stock Marine, and Stock Fire and Marine Insurance Companies; (d) Stock Casualty Insurance Companies; and (e) Mutual Insurance Companies of any kind other than mutual life insurance companies.

Section 202. Purposes for Which Companies May Be Incorporated.—* * *

(c) Stock casualty insurance companies may be incorporated for any or all of the following purposes:

(1) Guaranteeing the fidelity of persons holding places of public or private trust; guaranteeing the performance of contracts, other than insurance policies; guaranteeing the performance of insurance contracts, where surety bonds are accepted from insurance companies by States or municipalities in lieu of actual deposits; executing or guaranteeing bonds and undertakings required or permitted in all actions or proceed-

ings or by law allowed; and indemnifying banks, bankers, brokers, financial or moneyed associations, or financial or moneyed corporations, against the loss of any bills of exchange, notes, drafts, acceptances of drafts, bonds, securities, evidences of debt, deeds, mortgages, documents, currency, and money, except against loss caused by marine risks or risks of transportation or navigation. Also guaranteeing any Federal Land Bank against loss by reason of defective title or incumbrances on real property on which any such Federal Land Bank may make a loan secured by a mortgage.

(2) To insure against injury, disablement, or death resulting from traveling or general accident, and against disablement resulting from sickness, and every insurance appertaining thereto, including a funeral benefit to an amount not exceeding one hundred dollars.

(3) To insure glass against breakage.

(4) To insure any one against loss or damage resulting from accident to, or injury, fatal or non-fatal, suffered by, an employe or other person, for which the person insured is liable; or against loss or damage to property caused by horses, or by any vehicle drawn by animal power, for which loss or damage the person insured is liable.

(5) To insure steam boilers, and pipes, flywheels, engines, and machinery connected therewith or operated thereby, against loss caused by explosion or accident; and against loss of or damage to life, person, or

property resulting therefrom; and against loss of use and occupancy caused thereby; and to make inspection of, and issue certificates of inspection upon, such boilers, pipes, flywheels, engines, and machinery.

(6) To insure against loss or burglary or larceny or theft or forgery.

(7) To carry on the business of credit insurance or guaranty, either by agreeing to purchase uncollectible debts or otherwise; and to insure against loss or damage from the failure of persons indebted to the insured to meet their liabilities.

(8) To insure any goods or premises against loss or damage by water, caused by the breakage or leakage of sprinklers, pumps, or other apparatus, erected for extinguishing fires, and of water pipes; and against accidental injury, from causes other than fire or lightning, to such sprinklers, pumps, water pipes, or other apparatus; and against damage from use or occupancy of premises by reason of such breakage or leakage.

(9) To insure against loss or damage to elevators or other property, except loss or damage by fire, caused by the maintenance, operation, or use of elevators and machinery; loss or legal liability for damage to property resulting from such operation, maintenance, or use of elevators.

(10) To insure horses, cattle, and other live stock.

(11) To insure against loss or damage to automobiles and airplanes, seaplanes, dirigibles, or other

aircraft (except loss or damage by fire or while being transported in any conveyance by land or water), including loss by legal liability for damage to property resulting from the maintenance and use of automobiles and airplanes, seaplanes, dirigibles, or other aircraft.

Section 215. Examination of Companies; Certificate To Do Business.—(a) As soon as the entire amount of the authorized capital of a stock insurance company, incorporated under this act, has been paid in, certificates shall be issued therefor to the persons entitled to receive the same, which certificates shall be transferable upon the books of the company; and the president or secretary of the company shall notify the Insurance Commissioner that the entire capital of the company has been paid in, and that it is ready to commence business. Upon receipt of such notice, the Insurance Commissioner shall, in person or by deputy or examiners, examine the company; and, in case he finds that it has complied with the provisions of this act, and is possessed of funds, invested in the manner hereinafter specified, equal to the amount of its capital, he shall issue to said company a certificate showing that it has been organized in accordance with the provisions of this act, and that it has the requisite amount of capital for the transaction of business in the Commonwealth, which certificate shall empower the company to issue policies, and otherwise transact the business of insurance for which it was incorporated.

Section 602. Investment of Capital.—Every domestic stock casualty insurance company shall invest and keep invested in sound income-bearing securities all its capital and funds of every description, excepting

such cash as may be required in the transaction of its business, and such as it may invest in real estate as hereinafter authorized. The capital of every such company shall be invested as follows:

(a) In such real estate as it is authorized by this act to hold.

(b) In bonds of the United States or District of Columbia, or of any State or Territory of the United States or Canada, and in farm loan bonds issued by Federal Land Banks.

(c) In the legally authorized bonds or notes of any city, county, township, municipality, school or water district of this Commonwealth, or of any other State or Territory of the United States or Canada.

(d) In the bonds or notes of any solvent railroad or street railway corporation upon which no default in interest has been made.

(e) In ground-rents and loans upon improved and unencumbered real estate: Provided, That no loan on such real estate shall exceed sixty-six and two-thirds per centum (66 2-3%) of the fair market value thereof at the time of making such loan.

(f) Any such company which has one million dollars of capital and one million dollars of surplus may invest in the capital of any like company organized under the laws of this Commonwealth or of the laws of any of the United States, solely to transact the same class of business in countries outside of the United States. Such investment shall be limited to an amount not exceeding thirty per centum of the par value of the capital stock of the investing company.

Section 603. Investment of Surplus; Restrictions —Any money over and above the capital of any such stock casualty insurance company may be invested in the securities above enumerated, or loaned upon the security of the same; or in the stock or other evidence of indebtedness of any solvent, dividend paying corporation created under the laws of this Commonwealth or of any other State of the United States, or loaned upon the pledge of the same, except its own stock or the stock of any other insurance company transacting like classes of business. The current market value of such securities at the time of any loan thereon shall be at least fifteen per centum (15%) more than the sum loaned thereon. No such insurance company shall invest any of its funds in any unincorporated business or enterprise; nor in the stock or evidence of indebtedness of any corporation the owners or holders of which stock or evidence of indebtedness may, in any event, be or become liable on account thereof to any assessment, except for taxes; nor shall any of its funds be loaned on personal security. Not more than one-fifth (1-5) of its capital shall be invested in a single mortgage. No such company shall enter into any agreement to withhold from sale any of its property; but the disposition of its property shall be at all times within the control of its board of directors or trustees. If any investment or loan is made in a manner not authorized by this act, the officers and directors making or authorizing the same shall be personally liable for any loss occasioned thereby.

Any such stock casualty insurance company may invest in the capital stock and obligations of a corporation or corporations formed for the purpose of

taking and holding title to real estate and erecting or maintaining thereon a building or buildings to be used in whole or in part for the accommodation and transaction of the business of such insurance company without being subject to the limitation hereinbefore prescribed as to investment in the stock of a dividend paying corporation; but no such insurance company shall invest more than fifty per centum (50%) of its capital and surplus in the stock and other obligations of any such corporation or corporations, nor acquire and hold any of the stock or other obligations of any such corporation or corporations, if the total amount of the capital and other obligations of such corporation or corporations exceeds in the aggregate fifty per centum (50%) of the capital and surplus of such insurance company, without the written approval of the Insurance Commissioner.

Section 607. Procedure When Capital Impaired.—Any stock casualty insurance company receiving notice from the Insurance Commissioner that its capital is impaired shall immediately call upon its stockholders for such amounts as will restore its capital to the amount fixed by its charter. In case any stockholder neglects or refuses to pay the amount called for, after notice personally given or by advertisement, at such time and in such manner as the commissioner shall approve, the company shall require the return of the original certificate of stock held by such stockholder, and, in lieu thereof, issue new certificates in the proportion that the ascertained value of the assets of the company may, as determined by the commissioner, bear to the original capital; the company paying for any fractional parts of shares. The directors may

create new stock, and issue certificates therefor, and dispose of the same, at not less than par, for an amount sufficient to make up the original capital, or the commissioner may, in his discretion, permit the company to reduce its capital and the par value of its shares in proportion to the extent of the impairment, but the captial shall at no time be reduced to an amount less than that required by law for the organization of any such company. In fixing such reduced capital, not *more than fifty per centum* (50%) of the original capital shall be deducted from the assets on hand, to be retained as surplus funds; nor shall any part of the assets be distributed to stockholders.

The Insurance Department Act of 1921 (Act of May 17, 1921, P. L. 789, as amended by the Act of April 7, 1927, P. L. 161, the Act of June 22, 1931, P. L. 616, the Act of May 17, 1933, P. L. 798, and the Act of May 24, 1933, P. L. 982, 40 PS Sec. 1, et seq.)

Section 101. Certain Words Defined.—The word "company," as used in this act, shall be construed to include only incorporated insurance companies, and corporations possessing the power to insure owners of real property, mortgagees, and others interested in real property from loss by reason of defective titles, liens, and encumbrances, whether incorporated under the laws of this Commonwealth, or of any other state, territory or district, or under the laws of any foreign country.

Except where otherwise indicated, the word "association," as used in this act, shall be construed to include only individuals, partnerships, or associations of

individuals, authorized to engage in the business of insurance in the Commonwealth as insurers on the Lloyds plan.

The word "exchange," as used in this act, shall be construed to include only individuals, partnerships, and corporations, authorized by the laws of the Commonwealth to exchange with each other inter-insurance or reciprocal insurance contracts.

Section 102. Short Title.—This act shall be known and may be cited as "The Insurance Department Act of one thousand nine hundred and twenty-one."

Section 201. Insurance Department Established.—There is hereby established a department, to be known as the Insurance Department, which is charged with the execution of the laws of this Commonwealth in relation to insurance.

Section 213. Examination of Companies, Et Cetera.—The Insurance Commissioner shall require every domestic insurance company, association, and exchange to keep its books, records, accounts, and vouchers in such manner that he or his authorized representatives may readily verify its annual statements, and ascertain whether the company, association, or exchange has complied with the provisions of law. He shall, every three years, or oftener if he deems it to be necessary, personally or by his deputy, actuary, or examiners, visit each domestic insurance company, association, and exchange, and thoroughly inspect and examine its affairs to ascertain its financial condition and its ability to fulfill its obligations, whether it has complied

with the provisions of law, and any other facts relating to its business methods and management, and the equity of its plans and its dealings with its policyholders. He may, in like manner, when he determines it to be prudent for the protection of policyholders in this Commonwealth, compel the attendance of officers, or visit and examine, in person or by his deputy or examiners, any insurance company, association, or exchange of another State or foreign government applying for admission or already admitted to do business in this Commonwealth.

In lieu of such examination, the Insurance Commissioner may accept the report of examination made by or upon the authority of the supervising official of any other State.

The Insurance Commissioner shall grant a hearing to the corporation or other insurer or organization examined before filing such report, and may withhold any such report from public inspection for such time as he may deem proper, and may, if he deems it for the interest of the public to do so, publish any such report or the results of any such examination as contained therein in one or more newspapers of the State.

Section 214. Examination of Certain Corporations. —The Insurance Commissioner may examine into the affairs of any corporation, organized under any law of this Commonwealth, or the laws of any other State, or having an office or transacting business in this Commonwealth, which is engaged in, or is claiming or advertising that it is engaged in, organizing or receiving subscriptions for or disposing of stocks of, or in any manner aiding or taking part in the formation or in

the business of, an insurance company, association, or exchange, either as agent or otherwise, or which is holding the capital stock of one or more insurance companies for the purpose of controlling the management thereof as voting trustees or otherwise.

Section 216. Powers with Regard to Examinations. —For the purpose of any such examinations, the Insurance Commissioner, his deputy or his examiners, shall have free access to all the books and papers of any such company, association, exchange, bureau, or corporation which relate to its business, and to the books and papers kept by any of its agents, and may summon, and administer the oath to, and examine as witnesses, the directors, officers, agents, and trustees of any such company, association, exchange, bureau, or corporation, and any other person, relative to its affairs, transactions, and condition. He shall publish the result of his examination of the affairs of any company, association, exchange, or bureau, whenever he deems it for the interest of the policyholders so to do. All the expenses incurred in and about the examination of companies, associations, exchanges, bureaus, or corporations, including compensation of the deputies, examiners, and other employes of the department assisting in said examination, shall be charged to, and paid by, the company, association, exchange, bureau, or corporation examined, in equitable proportions, at such times and in such manner, as the commissioner shall, by general rule or regulation, prescribe.

Section 302. Notice of Impairment of Funds.— Whenever any life insurance company doing business

in this Commonwealth has not on hand the net value, as above defined, of all policies in force, after all other debts and claims against it, including fifty per centum of capital, have been provided for, the Insurance Commissioner shall notify such company and its agents to issue no new policies until its funds become equal to its liabilities.

Section 310. Computation of Unearned Premium Liability.—In determining the liabilities upon its contracts of insurance of any insurance company, other than life insurance companies, and the amount such company should hold as an unearned premium liability, the Insurance Commissioner shall, for casualty insurance, charge one-half of the premium on all annual policies written within one year, and, on policies written for more than one year, he shall charge one-half of the current year's premiums, plus the whole of the premiums for subsequent years. For fire insurance, he shall charge fifty per centum of the premiums written in their policies upon all unexpired risks that have one year or less than one year to run, and a pro rata of all premiums on risks having more than one year to run; on perpetual insurance, he shall charge the cash deposit received, less a surrender charge of not exceeding ten per centum thereof. For marine and inland insurance, he shall charge fifty per centum of the premium written in the policy upon yearly risks and upon risks covering more than one passage not terminated, and the full amount of the premium written in the policy upon all other marine and inland risks not terminated.

Section 311. Computation of Reserve Against Unpaid Losses in Casualty Insurance.—The Insurance Commissioner shall, in calculating the reserve against unpaid losses of casualty companies, other than losses under liability and workmen's compensation policies, set down, by careful estimate in each case, the loss likely to be incurred against every claim presented or that may be presented in pursuance of notice from the insured of the occurrence of an event that may result in a loss. The sum of the items so estimated shall be the total amount of the reserve, except that, in credit insurance, fifty per centum of the premiums on all credit policies expiring in the months of October, November, and December of the current year, less the amount of losses paid on such policies, shall, in addition thereto, be charged in the loss reserve.

Section 321. Notice of Impairment of Funds.—Having charged as a liability the reinsurance and loss reserves as above defined for insurance companies and exchanges of this Commonwealth other than life insurance companies, and adding thereto all other debts and claims against the company or exchange, the commissioner shall, in case he finds the capital or reserve of the company or exchange impaired twenty per centum, give notice to the company or exchange to make good the capital or reserve within sixty days.

Section 501. Suspension of Business of Insurance Companies, Et Cetera, by Insurance Commissioner.—The Insurance Commissioner shall suspend the entire business of any domestic insurance company, association, or exchange, fraternal benefit society or beneficial

society, and the business within this Commonwealth of any insurance company, association, or exchange, or fraternal benefit society or beneficial society of another State or foreign government during its non-compliance with any provision of law obligatory upon it, or whenever he shall find that its assets are insufficient to justify its continuance in business, by suspending or revoking its certificate of authority granted by him. If such insurance company, association, or exchange, fraternal benefit society or beneficial society was incorporated, organized, or is operating without authority of law, the commissioner shall have equal authority to suspend or dissolve as if a certificate of authority had been granted by law. If upon examination or other evidence exhibited to him, the Insurance Commissioner is of opinion that any insurance company, association, or exchange, or fraternal benefit society or beneficial society, or an officer or agent thereof, has violated any provision of the insurance laws, he shall report the facts to the Attorney General, who, under the direction of the Insurance Commissioner, shall take such legal action as the case may require.

Section 502. Applications to Court To Take Over Business of Companies, Et Cetera, for Protection of Policyholders, Creditors, Et Cetera.—Whenever any domestic insurance company, association, exchange, society, or order, including all corporations, associations, societies, and orders which are subject to examination by the Insurance Commissioner or which are doing, or attempting to do, or representing that they are doing, the business of insurance in this Commonwealth, or which are in process of organization

intending to do such business therein—(a) is insolvent; or (b) has refused to submit its books, papers, accounts, or affairs to the reasonable inspection of the Insurance Commissioner or his deputy or examiner; or (c) has neglected or refused to observe an order of the Insurance Commissioner to make good within the time prescribed by law any deficiency, whenever its capital, if it be a stock company, or its reserves, if it be a mutual company, an association, exchange, society, or order, shall have become impaired; or (d) has, by contract of reinsurance or otherwise, transferred or attempted to transfer substantially its entire property or business, or entering into any transaction the effect of which is to merge substantially its entire property or business in the property or business of any other company, association, exchange, society, or order, without having first obtained the written approval of the Insurance Commissioner; or (e) is found, after an examination, to be in such condition that its further transaction of business will be hazardous to its policyholders, or to its creditors, or to the public; or (f) has wilfully violated its charter or any law of the Commonwealth; or (g) whenever any officer thereof has refused to be examined under oath touching its affairs, the Insurance Commissioner shall communicate the facts to the Attorney General, who shall, after hearing, apply to the court of common pleas of Dauphin County, or to the court of any county in which the principal office of such company, association, exchange, society, or order is located, for an order directing such company, association, exchange, society, or order to show cause why its business should not be closed, and the Insurance Commissioner should not take possession

of its property and conduct its business, and for such other relief as the nature of the case and the interests of its policyholders, creditors, stockholders, or the public may require.

Section 503. Non-payment of Judgments by Mutual Companies; Assessment of Policyholders; Dissolution. —Whenever proof shall be submitted to the Insurance Commissioner showing that any execution against any mutual insurance company of this State, in pursuance of judgment obtained against said company in any court of record of this Commonwealth, has been returned nulla bona by the sheriff of the county in which said company is located, it shall be his duty to notify the Attorney General, who thereupon shall apply to the court of common pleas of Dauphin County, or to a judge thereof in vacation, for an order upon such company to show cause why its business should not be closed. Upon the hearing of such rule or order, the court or judge aforesaid shall direct the officers of said company to assess and collect from the policyholders thereof a sum sufficient to satisfy said judgment and execution and all other claims against said company, or make any other order or orders in the premises as may appear to said court or judge just and necessary. In case it shall finally appear to said court or judge that the company aforesaid cannot collect from its members sufficient funds to satisfy the claims against it, the said company shall be adjudged insolvent, and the court or judge aforesaid shall decree its dissolution, and appoint the Insurance Commissioner as receiver to take charge of its effects with like powers as hereinafter provided.

Section 504. Service of Process.—The order to show cause, and the papers upon which the same is made in any proceeding instituted under the provisions of this act, shall be served upon the company, association, exchange, society, or order named in such order in the manner prescribed for personal service of summons upon a domestic corporation by the laws of this Commonwealth. When it is satisfactorily proved by affidavit that the officers of the company, association, exchange, society, or order named in the said order to show cause, upon whom service is required to be made as above, provided, shall have departed from the State, or keep themselves concealed therein with intent to avoid service, such order to show cause may provide for service thereof in such manner as the court or judge by whom the same is made shall direct.

Section 505. Injunction; Return of Order to Show Cause and Decrees Thereon.—On such application, or at any time thereafter, such court may, in its discretion, issue an injunction restraining such company, association, exchange, society, or order from the transaction of its business or disposition of its property until the further order of the court. On the return of such order to show cause, and after a full hearing before the court or before an examiner appointed by the court, the court shall either deny the application or direct the Insurance Commissioner forthwith to take possession of the property and conduct the business of such company, association, exchange, society, or order, and retain such possession and conduct such business until, on the application either of the commissioner, through the Attorney General, or of such company, association, exchange, society, or order, it

shall, after a like hearing, appear to the court that the grounds for such order directing the Insurance Commissioner to take possession has been removed, and that the company, association, exchange, society, or order can properly resume possession of its property and the conduct of its business.

Section 506. Orders for Liquidation of Affairs of Companies, Et Cetera; Insurance Commissioner To Act as Receiver.—If, on a like application and order to show cause, and after a full hearing, the court shall order the liquidation of the business of such company, association, exchange, society, or order, such liquidation shall be made by and under the direction of the Insurance Commissioner, who shall be vested by operation of law with title to all of the property, contracts, and rights of action of such company, association, exchange, society, or order as of the date of the order so directing him to liquidate. The filing or recording of such order in any record office of the State shall impart the same notice that a deed, bill of sale, or other evidence of title, duly filed or recorded by such company, association, exchange, society, or order, would have imparted. The order of liquidation shall, unless otherwise directed by the court, provide that the dissolution of the company, association, exchange, society, or order shall take effect upon the entry of such order in the office of the clerk of the county wherein such company, association, exchange, society, or order had its principal office for the transaction of business.

Section 507. Insurance Commissioner to Supersede Other Receivers.—Whenever a receiver of an insurance company, association, exchange, society, or

order is appointed by any court of this Commonwealth, on motion of the Attorney General at the instance of the Insurance Commissioner, such receiver shall forthwith supersede any receiver previously appointed by the decree of any court of this Commonwealth, and shall likewise supersede any assignee or trustee previously appointed by such insurance company, association, exchange, society, or order.

Section 508. Superseded Receivers, Et Cetera, To Deliver Over Property and File Accounts.—Such superseded receiver, assignee, or trustee shall forthwith pay over and deliver all moneys, securities, assets, and property of such insurance company, association, exchange, society, or order in his or their custody, possession, or control to the receiver appointed as aforesaid on motion of the Attorney General, and shall likewise file his or their account in the court having jurisdiction of such superseded receiver, assignee, or trustee, which court shall allow credit for compensative counsel fees and expenses and for disbursements which shall have been properly earned, incurred, or made, prior to the appointment of the receiver made on motion of the Attorney General as aforesaid.

Section 509. Appointment of Special Deputies To Conduct Business or Liquidate Affairs of Companies, Et Cetera; Special Counsel; Compensation; Power to Administer Oaths and Subpoena Witnesses.—For the purposes of conducting the business or liquidating the affairs of such company, association, exchange, society, or order, the Insurance Commissioner shall have power to appoint, under his hand and official seal, one or more special deputy commissioners as his agent or

agents, and to employ such clerks and assistants as may by him be deemed necessary, and give each of such persons such powers to assist him as he may consider wise. The Attorney General shall appoint the attorneys or counsel necessary to advise the Insurance Commissioner or his deputies in each particular case. The compensation of such special deputy commissioners, counsel, clerks, and assistants, and all expenses of taking possession of and conducting the business or liquidating any such company, association, exchange, society, or order, shall be fixed by the commissioner, subject to the approval of the court, and shall on certificate of the commissioner, be paid out of the funds or assets of such company, association, exchange, society, or order. During the progress of any proceedings taken under this section, the commissioner, his deputies, or any examiner authorized by him, and the special deputy commissioner acting for the said commissioner therein, shall have all of the powers given to the commissioner, his deputy, or any examiner authorized by him, by the laws of this Commonwealth, including the power to examine under oath the officers and agents of such company, association, exchange, society, or order, and all persons deemed to have material information regarding the property or business of the company, association, exchange, society, or order, and to compel the production of all books and papers.

Section 510. Report of Insurance Commissioner as Receiver; Procedure Thereon.—When the Insurance Commissioner has, in pursuance of the provisions of this act, liquidated any company, association, exchange, society, or order, he shall, as soon as the assets

thereof have been converted into money, file a complete account in the court of common pleas of the county in which the proceedings were instituted, showing: (a) All deposits and assets of said company, association, exchange, society, or order; (b) all the moneys paid to him on account of the same; (c) all exceptions filed to any claims or accounts; (d) all payments made or contracted for by him; and (e) the scheme of distribution to creditors, policyholders, or stockholders. Such account shall be proceeded with and passed upon as other accounts are passed upon in said court. If exceptions to the account have been filed with the Insurance Commissioner, they shall have the same force and effect as if filed in the court. Upon confirmation of said account, if no exceptions be filed thereto, or upon the final disposition of exceptions thereto by the court, the Insurance Commissioner shall distribute the money as shown by said account or as decreed by the court, and, upon the complete distribution of all assets of said company, association, exchange, society, or order, he shall report the fact of said distribution to the court.

Section 511. Liquidation of Title Insurance Companies Partially under Supervision of Department of Banking.—The Insurance Commissioner may be appointed, in accordance with the provisions of this article, as liquidator of the title insurance business of any company which also has the power to transact any class of business under the supervision of the Department of Banking. The Insurance Commissioner shall promptly notify the Department of Banking of his appointment as liquidator of any such company.

Upon receipt of notice from the Secretary of Bank-

ing that, as receiver, he has taken possession of any such company, the Attorney General may procure the appointment of the Insurance Commissioner as liquidator of the title insurance business of such company in accordance with the provisions of this article.

SUPREME COURT OF THE UNITED STATES.

No. 431.—October Term, 1934.

Penn General Casualty Company, Petitioner, *vs.* Commonwealth of Pennsylvania *ex rel.* Wm. A. Schnader, Attorney General.	On Writ of Certiorari to the Supreme Court of the Commonwealth of Pennsylvania.

[February 4, 1935.]

Mr. Justice Stone delivered the opinion of the Court.

This case comes here on certiorari, — U. S. —, directed to the Supreme Court of Pennsylvania, to resolve questions of public importance growing out of the conflicting claims, of the federal district court and of the Insurance Commissioner of the Commonwealth of Pennsylvania, to jurisdiction over the liquidation of the business and affairs of appellant, an insolvent Pennsylvania insurance corporation.

The case was heard in the state supreme court upon an agreed statement of facts, deemed "necessary to a determination of the question involved in the appeal," which was filed in the state trial court. It purports to outline the substance of proceedings had in that court and in the federal district court. The question is stated to be whether the state court, "in view of the prior pendency of the suit . . . in the Federal court, had jurisdiction to enter the decree from which this appeal is taken." The records of the pleadings and proceedings in those courts are not included in the record and are not before us.

Appellant was organized under the Insurance Company Law of May 17, 1921, P. L. 682. On September 14, 1933, appellant's officers and directors appeared at a hearing before the Insurance Commissioner at which the president of the company was ordered to return to it assets which he had improperly withdrawn from the company, with consequent serious impairment of its financial condition. On October 14, 1933, a further hearing was held before the Attorney General of the state, at which it appeared that the company was in an unsafe and unsound condition.

On November 17, 1933, a shareholder of the insurance company filed his bill of complaint against the company in the district court

for eastern Pennsylvania. At this time negotiations, conducted by the Commissioner with the stockholders of the company, for its rehabilitation were pending. The complaint alleged that the stockholder was a resident of West Virginia; that the requisite jurisdictional amount was involved; that officers of the company had misappropriated and wasted its assets; that the company was insolvent and in a financially unsafe and unsound condition. The bill prayed the appointment of receivers, the liquidation of its property and business, and the usual injunction. Upon the filing of the bill, subpoena was issued and was served on the corporation on November 22, 1933.

On December 8, 1933, while the suit in the district court was pending, the Attorney General of the state, acting pursuant to § 502 of the Insurance Department Act of May 17, 1921, P. L. 789, filed a suggestion with the Court of Common Pleas of Dauphin County, alleging that the company was in a financially unsound condition; that the conduct of its business would be detrimental and hazardous to its policyholders, creditors and the public; that certain officers of the company had made illegal investments of the funds of the company and had appropriated to their own use other assets of the company. He prayed for an order, that the defendant show cause why the business of the company should not be closed, its charter vacated, and its assets taken into possession of the Insurance Commissioner for liquidation under his direction, and for an injunction. On the same day the Court of Common Pleas granted the order to show cause and enjoined the company from transacting any business and from disposing of its property until further order of the court. The order to show cause was served upon the company on December 11, 1933.

On December 14, 1933, the company filed an answer in the suit pending before the federal district court, substantially admitting the alleged withdrawal of assets and illegal investment, and denying the other allegations of the complaint, and alleging the pendency of the proceedings in the Court of Common Pleas.

On the same day the Court of Common Pleas entered a further order restraining the company and its officers or agents from transacting any business and from disposing of its property and restraining all persons other than the Insurance Commissioner and his agents from taking possession of it. On the following day the

federal district court entered an order which recited the pendency of the proceedings in the Court of Common Pleas and restrained the company and its officers or agents from permitting anyone to receive or take possession of its property and enjoining all persons from interfering with it in any way. On that day both the last mentioned restraining order of the Court of Common Pleas and that of the federal district court were served on the company.

After further proceedings the Court of Common Pleas entered its final decree, March 14, 1934, that the company be dissolved and directing the acting Insurance-Commissioner to take possession of and to liquidate the business and property of the casualty company in accordance with the provisions of the state Insurance Department Act. No final hearing has been held and no receiver has been appointed in the suit pending in the district court, but because of the restraining order of that court the company has refused to comply with the demand of the Commissioner for the surrender of its property in conformity with the decree of the state court.

On appeal from the Court of Common Pleas, the state supreme court treated the case as one involving only a conflict of jurisdiction between the state court and the federal court. It viewed the comprehensive statutory scheme of the Commonwealth for liquidating insurance companies by the Insurance Commissioner as binding on the company and its shareholder. It therefore thought that there could be no controversy between them which would be a proper subject of suit in the federal courts and that this was sufficient to preclude the exercise of jurisdiction of the federal court. It accordingly affirmed the decree. 316 Pa. 1.

The state court and the federal court have thus reached an impasse: each asserts the right to exercise its jurisdiction with respect to substantially the same subject matter, the liquidation of the business and assets of the insolvent corporation; each asserts its authority to enjoin interference, by the state officer on the one hand, and by any person except the state officer on the other; and each is unable to perform its function without acquiring possession and control of the property. In the state of the record before us, we confine our review to the single question of this conflict of jurisdiction considered and decided by the state court.

Section 502 of the Insurance Department Act authorizes the Commissioner to liquidate an insurance company when its condi-

tion is such that further transaction of its business will be hazardous; such liquidation is permitted only on an order or decree of the Court of Common Pleas, granted on application of the Attorney General of the state. Upon such application the court is authorized by § 505 to enjoin the company from transacting any business and from disposing of its property, and after a hearing to direct the Insurance Commissioner to take possession of the property and to liquidate it pursuant to the statute. By §§ 506, 507, the order of the court vests the Commissioner with the title to the property and supersedes the authority of any receiver appointed by any other state court.

It is plain that the state court, in the absence of the suit pending in the district court, would have acquired jurisdiction to proceed with the cause and to grant the relief sought. But the question now presented is whether its authority to proceed is affected by the pendency of the suit in the district court, which the state supreme court, on the record before it, treated as exercising a conflicting jurisdiction. The federal question, reviewable on appeal, is whether the state court has given proper effect to the proceedings and the order of the federal court. *Buck* v. *Colbath,* 3 Wall. 334, 340; *Crescent City Live Stock Co.* v. *Butchers' Union Slaughter House Co.,* 120 U. S. 141, 142; *Moran* v. *Sturges,* 154 U. S. 256, 267; *Central National Bank* v. *Stevens,* 169 U. S. 432, 456; *Farmers' Loan & Trust Co.* v. *Lake Street Elevated R. Co.,* 177 U. S. 51; *Wabash R. Co.* v. *Adelbert College,* 208 U. S. 38, 44, 54.

Where the judgment sought is strictly *in personam,* for the recovery of money or for an injunction compelling or restraining action by the defendant, both a state court and a federal court having concurrent jurisdiction may proceed with the litigation, at least until judgment is obtained in one court which may be set up as *res adjudicata* in the other. See *Buck* v. *Colbath, supra,* 342; *Kline* v. *Burke Construction Co.,* 260 U. S. 226, and cases cited at pages 230-231. But if the two suits are *in rem* or quasi *in rem,* requiring that the court or its officer have possession or control of the property which is the subject of the suit in order to proceed with the cause and to grant the relief sought, the jurisdiction of one court must of necessity yield to that of the other. To avoid unseemly and disastrous conflicts in the administration of our dual judicial system, see *Peck* v. *Jennes,* 7 How. 612, 625; *Taylor* v. *Carryl,* 20 How. 583, 595; *Freeman* v. *Howe,* 24 How.

450, 459; *Buck* v. *Colbath, supra,* 341; *Farmers' Loan & Trust Co.* v. *Lake Street Elevated R. Co., supra,* 61, and to protect the judicial processes of the court first assuming jurisdiction, *Wabash R. Co.* v. *Adelbert College, supra,* 54; *Palmer* v. *Texas,* 212 U. S. 118, 129, 130, the principle, applicable to both federal and state courts, is established that the court first assuming jurisdiction over the property may maintain and exercise that jurisdiction to the exclusion of the other. This is the settled rule with respect to suits in equity for the control by receivership of the assets of an insolvent corporation. *Leadville Coal Co.* v. *McCreery,* 141 U. S. 475, 477; *Porter* v. *Sabin,* 149 U. S. 473, 480; *Farmers' Loan & Trust Co.* v. *Lake Street Elevated R. Co., supra; Wabash R. Co.* v. *Adelbert College, supra; Palmer* v. *Texas, supra; Lion Bonding & Surety Co.* v. *Karatz,* 262 U. S. 77, 88, 89; *Harkin* v. *Brundage,* 276 U. S. 36.

Where the assertion of jurisdiction by the two courts is nearly simultaneous, it becomes important, as in the present case, to determine the precise time when the jurisdiction attaches. If the two suits do not have substantially the same purpose, and thus the jurisdiction of the two courts may not be said to be strictly concurrent, and if neither court can act effectively without acquiring possession and control of the property *pendente lite,* the time of acquiring actual possession may perhaps be the decisive factor. Compare *Moran* v. *Sturges, supra,* 284; *Harkin* v. *Brundage, supra,* 43. But when the two suits have substantially the same purpose and the jurisdiction of the courts is concurrent, that one whose jurisdiction and process are first invoked by the filing of the bill is treated as in constructive possession of the property and as authorized to proceed with the cause. *Harkin* v. *Brundage, supra,* 43-45. Jurisdiction thus attaches upon the filing of the bill of complaint in court, at least where process subsequently issues in due course. *Palmer* v. *Texas, supra,* 129; *Farmers' Loan & Trust Co.* v. *Lake Street Elevated R. Co., supra,* 60; compare *Smith Purifier Co.* v. *McGroarty,* 136 U. S. 237, 240. The confusion and uncertainty are thus avoided which might otherwise result from the attempt to resolve the troublesome question of what constitutes actual possession and to determine priority of service of process in the two suits.

In the present case there are outstanding injunctions by both courts restraining any interference with the property in the hands of the insolvent corporation, and neither the Insurance Commis-

sioner nor the district court has taken possession. The suits relate to substantially the same subject matter. Each sought relief by injunction against creditors, marshalling and conservation of the corporate assets and their liquidation and distribution among the creditors and shareholders. The jurisdiction invoked by the two suits was concurrent, see *Harkin* v. *Brundage, supra,* 45, and since the bill was filed in the district court before the application of the Attorney General to the state court, the jurisdiction of the district court first attached; it has asserted this jurisdiction by its injunction order. Hence, it alone can rightfully assert control over the property and proceed with litigation which affects that control, *Palmer* v. *Texas, supra,* 129, 130; *Wabash R. Co.* v. *Adelbert College, supra,* 54, and it alone can determine how far it will permit any other court to interfere. *People's Bank* v. *Calhoun,* 102 U. S. 256, 262; see *Riggs* v. *Johnson Co.,* 6 Wall. 166. Its authority as a federal court to entertain the suit is not restricted by the procedure established by local statutes for the liquidation of insurance companies. The jurisdiction conferred on the district courts by the Constitution and laws of the United States cannot be affected by state legislation. See No. 394, *Commonwealth of Pennsylvania* v. *Williams, et al.,* decided this day.

Although the district court has thus acquired jurisdiction, the end sought by the litigation in the state court is the liquidation of a domestic insurance company by a state officer. In the absence of a showing that the interests of creditors and shareholders would not be adequately protected by this procedure, the case was a proper one for the district court, in the exercise of judicial discretion, to relinquish the jurisdiction in favor of the administration by the state officer. See No. 394, *Commonwealth of Pennsylvania* v. *Williams, et al., supra.*

The authority of the Insurance Commissioner to proceed with the liquidation under state law, it is true, rests on the decree of the state court entered after the district court had acquired jurisdiction. But even though the jurisdiction of the district court had attached, the state court was not without power to designate the Insurance Commissioner as the vehicle of the state authority to control the property whenever that could lawfully be done. While it is often said that of two courts having concurrent jurisdiction *in rem,* that one first taking possession acquires exclusive jurisdiction, see *Peck* v. *Jennes, supra,* 624, 625; *Wabash R. Co.* v. *Adelbert College, supra,* 54; *Harkin* v. *Brundage, supra,* 43, it is exclu-

sive only so far as its exercise is necessary for the appropriate control and disposition of the property. The jurisdiction does not extend beyond the purpose for which it is allowed, to enable the court to exercise it appropriately and to avoid unseemly conflicts. See *Leadville Coal Co.* v. *McCreery, supra,* 477. The other court does not thereby lose its power to make orders which do not conflict with the authority of the court having jurisdiction over the control and disposition of the property. *Yonley* v. *Lavender,* 21 Wall. 276; *Heidritter* v. *Elizabeth Oil-Cloth Co.,* 112 U. S. 294, 304; *Byers* v. *McAuley,* 149 U. S. 608. If it has appointed a receiver, it may and should give him directions for the surrender of the property to the court having prior jurisdiction, or it may make suitable orders permitting him to take possession and proceed with the liquidation when the court having jurisdiction over the property relinquishes it. See *Harkin* v. *Brundage, supra,* 57. The confirmation by the Court of Common Pleas of the right of the Insurance Commissioner to liquidate the company did not infringe the authority of the district court to make appropriate disposition of the property. But it did confer on the Commissioner the requisite authority to ask the district court to relinquish its jurisdiction in favor of the state administration.

Since the district court had first acquired jurisdiction to liquidate the property of the insurance company, and had authority to proceed with the cause for that purpose, the supreme court of the commonwealth erred in affirming so much of the decree of the Court of Common Pleas as directed the Insurance Commissioner to take possession of the business and property of the company, and so far as it affirmed the order of that court which enjoined the company from surrendering its books, records and assets to any person other than the Commissioner, and enjoined others from taking possession of them. The decree must accordingly be reversed and the cause remanded for further proceedings not inconsistent with this opinion, but without prejudice to an application by the Commissioner to the district court for an order relinquishing its jurisdiction over the property of the company and vacating its injunction against surrender of it to the Commissioner for liquidation under the Insurance Department Law of the state. See No. 394, *Commonwealth of Pennsylvania* v. *Williams, et at, supra.*

Reversed.